No. 85-807

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In The

Supreme Court of the United States

October Term, 1985

SERGE KOWALCHUK, a/k/a SERHIJ KOWALCZUK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether mere employment in a clerical position with a local Ukrainian auxiliary police force during the occupation of the Ukraine by Nazi Germany constitutes voluntary assistance to enemy forces in their operations against the United Nations which excluded petitioner from being "of concern" to the International Refugee Organization (IRO) and rendered him ineligible for admission to the United States under the Displaced Persons Act of 1948?

2. Whether materiality under *Chaunt*, or under the DPA's administrative interpretation of § 10 of the DPA as applied to misrepresentations in IRO Assistance Applications or in camp fragebogen, required the government to prove the existence of ultimate facts which would have warranted denial of citizenship?

3. Whether due process was violated where petitioner was unable to seek, identify or interview witnesses in the Soviet Union whose testimony was material in his denaturalization proceeding and where government witnesses were found, produced and deposed under the control of Soviet authorities?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Serge Kowalchuk prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, en banc, which affirmed the judgment of the District Court revoking his citizenship and cancelling his certificate of naturalization.

OPINIONS BELOW

The opinion and dissenting opinion of four judges of the United States Court of Appeals for the Third Circuit, en banc, are reported at 773 F. 2d 488, and also appear as Appendix A to this petition. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 571 F. Supp. 72, and also appears as Appendix C to this petition. The panel opinion and dissenting opinion of the United States Court of Appeals for the Third Circuit was withdrawn from publication, but appears in full as Appendix B to this petition.

STATEMENT OF JURISDICTION

The government filed its complaint under § 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §1451(a) (1982). The District Court exercised jurisdiction pursuant to 8 U.S.C. § 1451 (1982) and 28 U.S.C. § 1345 (1982). The Court of Appeals exercised appellate jurisdiction under 18 U.S.C. § 1291 (1982). The judgment of the Court of Appeals was entered on September 23, 1985. This petition is timely filed on November 22, 1985, pursuant to Supreme Court Rule 20.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§ 340 of the Immigration and Nationality Act of 1952, As Amended, 8 U.S.C. § 1451(a):

(a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1429 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of the certificate of naturalization shall be effective as of the original date of the order and certificate, respectfully: Provided That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization

under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

§ 2(b) of the Displaced Persons Act of 1948 (DPA), Pub. L. No. 80-774, Ch. 647, 62 Stat. 1009 (1948), 50 U.S.C. App. (1952 Ed.) § 1951(b):

> "Displaced person" means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization (IRO).

§ 10 of the Displaced Persons Act of 1948 (DPA), Pub. L. No. 80-774, Ch. 647, 62 Stat. 1009 (1948), 50 U.S.C. App. (1952 Ed.) § 1959:

> No eligible displaced person shall be admitted into the United States unless there shall have first been a thorough investigation and written report made and prepared by such agency of the government of the United States as the President shall designate, regarding such person's character, history and eligibility under this Act. The burden of proof shall be upon the person who seeks to establish his eligibility under this Act. Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall

thereafter not be admissible into the United States. No eligible displaced orphan or eligible displaced person shall be admitted into the United States under the provisions of this Act except in pursuance of the regulations of the Commission, but, except as otherwise expressly provided in this Act, the administration of this Act, under the provisions of this Act and the regulations of the Commission as herein provided, shall be by the officials who administer the other immigration laws of the United States. Except as otherwise authorized in this Act, all immigration laws, including deportation laws, shall be applicable to eligible displaced orphans and eligible displaced persons who apply to be or who are admitted into the United States pursuant to this Act.

§ 13 of the Displaced Persons Act of 1948 (DPA), Pub. L. No. 80-774, Ch. 647, 62 Stat. 1009 (1948), 50 U.S.C. App. (1952 Ed.) § 1962:

Sec. 13. No visas shall be issued under the provisions of this act to any person who is or has been a member of or participated in any movement which is or has been hostile to the United States or the form of government of the United States.

Annex I, Part II, Constitution of the International Refugee Organization of the United Nations (IRO), 62 Stat. 3037, 3051-52, T.I.A.S. No. 1846:

Persons who will not be the concern of the Organization.

1. War criminals, quislings and traitors.

2. Any other person who can be shown:

(a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

(b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.[1]

---

1. Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation, shall not be considered to constitute "voluntary assistance". Nor shall acts of general humanity, such as care of wounded or dying, be so considered except in cases where help of this nature given to enemy nationals could equally well have been given to Allied nationals and was purposely withheld from them. [Footnote in the original.]

STATEMENT OF THE CASE

The government sued under 8 U.S.C. § 1451(a) in the District Court, seeking revocation of petitioner's citizenship on the ground that his naturalization had been illegally procured and procured by concealment of a material fact or by willful misrepresentation. The genesis of these proceedings was an article that first appeared in the Soviet publication, *Trud*, an organ of the KBG, and later carried by the American wire services, accusing Kowalchuk of committing atrocities during World War II.

The gist of the government's case is that petitioner failed to disclose his membership in and employment by the local Ukrainian police and his residence in Lubomyl, Ukraine, during 1939 and 1944 on two questionnaires he completed during his D.P. camp processing in 1947 and 1949. The government charged that the Lubomyl militia and petitioner personally committed acts of atrocity and persecution against Jewish inhabitants of Lubomyl, and thus assisted Nazi Germany in the war.

Petitioner was born in Kremianec, Ukraine, on January 15, 1920. In 1933 his family moved to Lubomyl because of his father's job transfer in the Polish government's tax administration. In 1939, when the Soviet army and government occupied Lubomyl under its non-aggression pact with Germany, petitioner's father lost his job and was subsequently arrested and threatened with deportation to Siberia based on his history of anti-communist activity.

On June 23, 1941, Nazi Germany invaded the Soviet Union and occupied Lubomyl. To avoid deportation to Germany, petitioner sought employment from the Mayor of Lubomyl and was given a part-time job at a food distribution center operated by the local government for its employees. In mid-1942, the Germans took control of the local Lubomyl government. Petitioner

continued his part-time duties at the food distribution center, and in addition, he was assigned to do clerical work for the local Ukrainian militia known as the Lubomyl schutzmannschaft. Petitioner's duties as a clerk to the militia were restricted to typing duty rosters and daily reports of police activity, and filing the records of the organization.

In August 1942, petitioner was sent to Matiew, Poland for further training in local administration, concentrating on business and secretarial courses; his expenses were paid by the local government. Upon completion of these studies in January 1943, he returned to his job as a clerk with the Lubomyl schutzmannschaft on a full-time basis since the food distribution center operated by the local government had been closed.

During petitioner's absence, the Germans carried out the execution of approximately 5,000 Jews residing in the Lubomyl ghetto. Nazi persecution of the Jews had begun shortly after the German forces occupied Lubomyl in June 1941 and all Jews were eventually moved into the ghetto. Thereafter, the Nazis instituted persecutorial policies restricting the Jews to the ghetto, forcing them into slave labor, depriving them of their property, and committing violent assaults against them, culminating in a mass execution in October 1942. The role played by the Lubomyl schutzmannschaft in the persecution is unclear. The government did not produce any documentary evidence concerning the participation of the Lubomyl schutzmannschaft in the persecution of or violence against the Jewish population. Furthermore, the Ukrainian schutzmannschaft does not appear on the comprehensive Inimical List of organizations hostile to the United States or its form of government under § 13 of the 1950 version of the DPA.

The government did present testimony from an expert, Professor Raul Hilberg, to the effect that indigenous forces were

necessary to carry out the functions of the government and to enforce the restrictions imposed by the Germans. The government also presented the testimony of six Soviet and three non-Soviet witnesses to the events of Lubomyl, all but Soviet witnesses testified by videotape deposition taken in the U.S.S.R. The District Court found the non-Soviet witnesses' testimony unreliable and viewed the testimony of the Soviet witnesses with even greater skepticism, concluding that the government had failed to present clear, unequivocal and convincing evidence that petitioner personally participated in either the October 1942 massacre or in any other atrocities against the Jewish population of Lubomyl (Appendix C, 141a). This finding was not disturbed by the Court of Appeals.

In March 1944, when the Germans retreated from the Ukraine, petitioner and his younger brother, Mykola, fearing Soviet persecution fled with their family to Czechoslovakia and ultimately arrived at a displaced persons camp in Lexenfeld, Austria. The camp was operated by the International Refugee Organization (IRO) of the United Nations pursuant to its mandate to provide for refugees and displaced persons who were not willing to return to their native countries.

On November 25, 1947, petitioner executed a form prepared by the Preparatory Committee to the IRO (PCIRO) called an Application for Assistance, commonly known as the CM/1 form. On this application, petitioner misrepresented that he lived in Kremianec, not Lubomyl, from September 1939 to March 1944 and that he had been employed there as a tailor's apprentice. Petitioner testified that at the time he filled out the CM/1 form, he informed the person who assisted him in filling out the application that he in fact had worked for the local government in Lubomyl, but feared that if he had included this information in the application, the Soviets might utilize it to harm his family remaining in the Soviet Union. The CM/1 is not an American immigration document.

In April 1949, petitioner filled out another personal history questionnaire, the fragebogen, printed in German, a language of which petitioner had only a limited knowledge. The part of the fragebogen, concerning previous employment history and residence, had, as was customary, already been completed before petitioner's interview. Further, when petitioner answered the fragebogen, he testified that he did not realize that it would be used specifically for the purpose of applying for United States immigration since at that time he was applying to emigrate to a number of different countries. On November 21, 1949, based on information appearing in his CM/1, the IRO certified petitioner as a person "of concern" to the IRO.

The IRO forwarded petitioner's fragebogen and CM/1 form to the Displaced Persons Commission (DPC), who conducted an extensive investigation in order to determine whether petitioner met the eligibility requirements of the DPA. A representative of the DPC wrote a report which was later forwarded with the CM/1 and the fragebogen to United States Consular officials. On December 13, 1949, the DPC found petitioner appeared before a vice-consul of the United States at Salzburg, Austria, where he filled out a visa application which asked no questions about wartime residence or employment, and on December 29, 1949, he obtained a visa for admission as a displaced person.

Petitioner entered the United States as a permanent resident on February 2, 1950. Ten years later, in applying for naturalization, petitioner made no misrepresentations and concealed no material facts. On November 30, 1960, his petition for naturalization was granted and he was admitted to citizenship.

At trial, the government called various officials and representatives who administered the IRO and DPA to establish that petitioner would not have been eligible under the DPA if he had disclosed the true facts when he applied for admission

to the United States.

The District Court concluded that petitioner illegally procured his citizenship by entering this country on the basis of an invalid visa. The District Court found that petitioner was not a genuine refugee "of concern" to the IRO, and therefore was ineligible for admission under the DPA because petitioner assisted the Nazis in persecuting civilian populations and he was voluntarily a member of the Lubomyl schutzmannschaft, an organization that voluntarily assisted the enemy forces in their operations against the United Nations. The second ground upon which the District Court relied was that petitioner illegally obtained his visa in that he made a willful misrepresentation of a material fact for the purpose of obtaining admission into the United States as an eligible displaced person under the DPA.

On appeal to the United States Court of Appeals for the Third Circuit, that Court in a panel decision (2-1) reversed the District Court, but on reargument en banc the decision was affirmed. The Court of Appeals held that petitioner's membership in the Lubomyl schutzmannschaft constituted voluntary assistance to the enemy in their operations against the United Nations and found that petitioner's misrepresentations of his employment and residence were willful misrepresentations for the purpose of gaining admission into the United States and material under the first prong of the two-pronged test for materiality announced in *Chaunt v. United States*, 364 U.S. 350 (1960) (Appendix A, 13a, 20a). The Court of Appeals did not reach the issue of whether petitioner "assisted the enemy in persecuting civilian populations" nor did the court find it necessary to resolve the question of whether petitioner's misrepresentations were material under the second prong of the *Chaunt* test (Appendix A, 20a). The Court of Appeals found no merit to petitioner's due process claim that his rights were violated by the Soviet Union's refusal of access to witnesses and documents while the government's case was fully provided

by the Soviet government (Appendix A, 21a).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals has misconstrued "voluntary assistance" under the Displaced Persons Act.

The Court of Appeals found that: "the defendant's voluntary membership in the Ukrainian schutzmannschaft constituted voluntary assistance to the enemy" (Appendix A, 13a). The holding of the Court of Appeals does substantial violence to the requirement that, in order to not be "of concern" to the IRO, a displaced person must have *voluntarily assisted* the enemy forces in their operations against the United Nations.

The reasoning employed by the Court of Appeals is at odds with all concepts of the conduct necessary to constitute voluntary assistance in that any requirement of establishing an intent-to-aid is completely eliminated and the word "voluntary" is rendered meaningless. A footnote to § 2(b) of the IRO Constitution, which was incorporated into the DPA, provides that:

> [1] Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation, shall not be considered to constitute "voluntary assistance". Nor shall acts of general humanity, such as care of wounded or dying, be so considered except in cases where help of this nature given to enemy nationals could equally well have been given to Allied nationals and was purposely withheld from them. [Footnote in the original.]

IRO Constitution, § 2(b), 62 Stat. at 3052. This footnote requires that voluntary assistance must be shown by proof of an individual's intent that he acted with the "specific purpose of aiding the enemy". This type of conduct requires that purposefulness of action shown by one who deliberately chose to assist the enemy. Mere employment in a clerical position by the Lubomyl schutzmannschaft cannot in and of itself constitute proof of the "voluntary assistance" required by statute.

The Court of Appeals also fashioned an impermissible administrative presumption which operated to lighten the government's burden of proof. The applicable standard in denaturalization cases is that the evidence must be clear, unequivocal and convincing and not leave the issue in doubt, a burden which "is substantially identical with that required in criminal cases — proof beyond a reasonable doubt". *Klapprott v. United States,* 335 U.S. 601, 612 (1949); *United States v. Fedorenko,* 449 U.S. 490, 505 (1981); *Costello v. United States,* 365 U.S. 265, 269 (1961); *Schneiderman v. United States,* 320 U.S. 118, 125 (1943); *Baumgartner v. United States,* 322 U.S. 665, 670 (1944). By utilizing §§ 22 and 27 of Chapter VI of the *IRO Manual for Eligibility Officers* as creating a presumption of voluntariness under which an applicant had the obligation to "disprove the voluntary nature of his enlistment" (Appendix A, 13a), the Court of Appeals impermissibly shifted the burden of proof to the petitioner. In various criminal contexts, this Court has repeatedly held that the use of such a presumption to eliminate an element of the prosecution's proof violates due process. *Francis v. Franklin,* 105 S. Ct. 1965 (1985); *Sandstrom v. Montana,* 442 U.S. 510 (1979); *Mullaney v. Wilbur,* 421 U.S. 684 (1975). The decision below allows an administrative presumption, in combination with the equivocal testimony of IRO and DPA

officials*, to take the place of the clear, convincing and unequivocal evidence of "each material fact" required by this Court in denaturalization proceedings. *Woodby v. INS*, 385 U.S. 276 (1966).

Petitioner also submits that the decision below is in conflict with the specific holding of this Court on the type of conduct required to establish "assistance" to the enemy within the permissible scope of a narrowly drawn statute. The court below failed to consider this Court's adoption in *Rowoldt v. Perfetto*, 355 U.S. 115, 120 (1957), of a "meaningful association" requirement in determining whether under the Internal Security Act of 1950 mere membership in the Communist Party for the purpose of obtaining the necessities of life was a sufficient nexus to the organization. The decision of the Court of Appeals ignored this Court's language in *Fedorenko, supra*, that the word "voluntary" in § 2(b) of the DPA must be deemed significant in determining eligibility. 449 U.S. at 512. A determination of ineligibility based on mere membership rather than personal participation directly conflicts with recent decisions of the Second and Ninth Circuits under similar statutory language. *United States v. Sprogis*, 763 F. 2d 115, 122 (2d Cir. 1985) (assistance in persecution under DPA and § 2(a) of the IRO Constitution requires proof of personal active participation, not mere passive accommodation of Nazis by performance of occasional ministerial tasks as a native police officer in Latvia during World War II); *Laipenieks v. INS*, 750 F. 2d 1427, 1432 (9th Cir. 1985) (assistance in persecution under 8 U.S.C. § 1251(a)(19) requires clear and convincing "proof of personal active assistance or participation in persecutorial acts"). The Court of Appeals' majority decision

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* The dissenting opinion of Chief Judge Aldisert accurately summarizes the pitfalls in the Court of Appeals' conclusion that the testimony of the government witnesses "convincingly demonstrate(s) that the defendant's voluntary membership in the schutzmannschaft constituted voluntary assistance to the enemy." (Appendix A, 46a fn. 8).

effectively renders the phrase "voluntary assistance" meaningless by permitting mere clerical employment (the facts here do not justify the term "membership") by a local government police office in Nazi-occupied Ukraine constitutes the deliberate assistance with intent-to-aid the enemy within the meaning of the DPA (1948 version).

II.

This Court should resolve the question whether, under the materiality standard of *Chaunt v. United States* or § 10 of the DPA of 1948, to the extent they apply to false statements in pre-visa documents, requires the government to prove the existence of disqualifying facts.

In *United States v. Fedorenko,* 449 U.S. 490 (1981), this Court found it unnecessary to determine whether *Chaunt's* materiality test applies to misrepresentations made at the visa application stage. *Id.* at 509. *Chaunt* only passed on the materiality standard applicable to misrepresentations or concealment of material facts in applications for citizenship, where the false statements are made under oath and the heightened awareness of the demand for truthfulness exists. *Chaunt v. United States,* 364 U.S. 350 (1960).

The Court of Appeals recognized that *Chaunt's* holding was limited to the naturalization context and that *Fedorenko* left undecided the question of its applicability at earlier stages of immigration. However, the court erroneously applied *Fedorenko.* The Third Circuit majority cited the following language from *Fedorenko* as the basis for its holding that petitioner's false statements were material:

> At the very least, a misrepresentation must be considered material if the disclosure of the true facts would have made the applicant ineligible for

> a visa. *Id.* at 509. [Appendix A, 16a.]

The court concluded:

> Had Kowalchuk revealed the facts which he suppressed on December 29, 1949, the day he obtained his visa, those facts would have warranted the denial of his visa and thereby precluded him from obtaining citizenship. [Appendix A, 17a.]

First, no one testified that Kowalchuk concealed any facts on December 29, 1949. The vice consul who interviewed him did not testify and the visa application was truthfully completed. Second, this statement flies in the teeth of this Court's distinction between an armed guard in a death camp and a barber or other unarmed personnel not personally involved in persecution or willing support of the Nazis. Kowalchuk is on the barber's side of the line drawn in *Fedorenko*.

In so applying the *Chaunt* materiality standard in the instant case, the Court of Appeals ignored *Fedorenko's* mandate that eligibility under the DPA must be interpreted in light of that Act's provisions (particularly § 10) as to materiality of misrepresentations and the administrative practice of the IRO and DPA at the time the false statements were made. *Fedorenko, supra* at 510-512. The court below improperly applied *Chaunt* to a D.P. camp factual setting and ignored contemporary standards.

At the time petitioner executed the CM/1 form, wherein his residence and employment from 1939 through 1944 were misstated, the Displaced Persons program of the United States was not in existence and his application was not made for the purpose of immigration into the United States. The District Court found that petitioner possibly "informed the interviewer of the true situation" when he filled out his IRO application and that "it is probably

true that the background information in the fragebogen was largely the result of merely copying the information set forth in the CM/1 form" (Appendix C, 142a). There were no questions asked of petitioner concerning wartime residence or occupation in the visa application he submitted on December 29, 1949. Therefore, materiality should have been interpreted in light of the IRO guidelines in effect in 1947 and 1949 when the false representations were made in the pre-visa documents.

We urge this Court to grant certiorari to consider what materiality standard is applicable in the pre-visa stage and whether the IRO and DPA regulations then in force may be entirely ignored, contrary to the teachings of *Fedorenko*. This issue potentially affects hundreds of thousands of naturalized citizens. To date, there has been no Supreme Court decision addressing the interaction of the DPA and the IRO provisions in this context. *Fedorenko* has been this Court's only decision in the last 25 years to examine the standards governing materiality in immigration matters and the only case that has meaningfully addressed the DPA and IRO. Petitioner submits that it is unconstitutional to denaturalize a citizen of the United States who had not willfully misrepresented a material fact to gain admission under a standard made retroactively applicable to his pre-visa application statements so as to penalize him for failing to disclose information not then considered material, *i.e.*, disqualifying if the truth were known.

This Court stated in *Chaunt* that the government must prove by clear and convincing evidence:

> Either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to a discovery of other facts warranting denial of citizenship. *Id.* at 355.

If this Court should agree that petitioner's misrepresentations were immaterial under an application of *Chaunt's* first clause or other standard, then the applicability and meaning of clause two must be faced and a clear Circuit split exists on that question.

The courts of appeals are split on the import of the second prong of *Chaunt's* materiality test. Five Circuits have held that the government need only prove under this second prong of *Chaunt,* that had the false statement not been made, an investigation would have been conducted that *might* have uncovered facts warranting denial of a visa. *Langhammer v. Hamilton,* 295 F. 2d 642 (1st Cir. 1961); *Maikovskis v. INS,* 773 F. 2d 435 (2d Cir. 1985); *United States v. Oddo,* 314 F. 2d 115 (2d Cir. 1963), *cert. denied,* 375 U.S. 833 (1963); *United States v. Fedorenko,* 597 F. 2d 946 (5th Cir.), *aff'd on other grounds,* 449 U.S. 490 (1981); *Kassab v. INS,* 364 F. 2d 806 (6th Cir. 1966); *United States v. Koziy,* 728 F. 2d 1314 (11th Cir.), *cert. denied,* 105 S. Ct. 130 (1984). On the other hand, three Circuits, including the Third Circuit, require that the government prove that ultimately disqualifying facts exist. *United States v. Riela,* 377 F. 2d 986 (3d Cir. 1964); *United States v. Rossi,* 299 F. 2d 650 (9th Cir. 1962); *United States v. Sheshtawy,* 714 F. 2d 1038 (10th Cir. 1983). This Court took note of this conflict in *Fedorenko.* 449 U.S. at 521, n. 4. However, it decided the case on other grounds. *Id.* at 518, n. 40. In separate opinions, Justices Blackmun, White and Stevens discussed their interpretations of the meaning of the second clause of *Chaunt* and reached divergent conclusions. *Fedorenko, supra* at p. 518 (Blackmun, concurring), at p. 526 (White, dissenting), at p. 530 (Stevens, dissenting). Petitioner suggests that this case offers a vehicle to resolve this conflict among the courts of appeals and to clarify the materiality standard in immigration law.

III.

The Court of Appeals improperly required petitioner to make a showing that he was deprived of specific evidence and that testimony that was unavailable would have been material and favorable to his defense where he was denied the opportunity to investigate or interview potential witnesses from the Soviet-controlled area where the alleged disqualifying events took place forty years ago.

The Court of Appeals summarily dismissed petitioner's due process contention stating:

> However, as the district court observed, Soviet Russia also imposed the same limitations upon Government counsel. The defendant does not make any claim that he was deprived of any specific evidence or testimony. He makes no showing that any testimony has been excluded that "would have been material and favorable to his defense". *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867 (1982) [Appendix A, 20a.]

The Soviet Union did not impose the same limitations on government counsel. The Soviets gave the government its entire case. The Court of Appeals' majority unrealistically found petitioner less than diligent in pursuing production of witnesses. The majority incorrectly and naively assumed the safety of disclosing witnesses' names and alignment to the Soviet Procurators regardless of possible consequences to them.

The District Court's factual findings, the majority held, were based only upon petitioner's testimony and that of his witnesses, or other evidence not inconsistent with that testimony, thus the error was harmless (Appendix A, 21a). It ignored what petitioner

might have proved if he could have visited Lubomyl, brought his former neighbors to a safe forum and sought Russian records.

The Court of Appeals ignores the fact that the only witnesses available to the petitioner were those that the Soviet authorities handed to the government. The Soviets controlled the witnesses supplied, without significant input from the United States, and foreclosed petitioner's access to any possible exculpatory evidence.

The Court of Appeals found that petitioner's request to interview 18 witnesses from Lubomyl was waived by his failure to name the specific witnesses in advance (Appendix A, 20a). Petitioner testified that he was afraid to disclose to the Soviet authorities the names of these potential witnesses because of his fear of reprisal against the witnesses.

In *Washington v. Texas,* 388 U.S. 14 (1967), this Court held that:

> The right to offer the testimony of witnesses, and compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *Id.* at 19.

Petitioner's due process right to present a meaningful defense to the Soviet-instigated charges was violated. The Court of Appeals' reliance upon *Valenzuela-Bernal* distorts that case's holding. In *Valenzuela-Bernal* the defendant was convicted of transporting

an illegal alien through a border patrol check-point. Two of the passengers in the defendant's car were deported after they admitted they were illegally in this country; another passenger was detained as a witness. This Court held that the defendant's contention that the deportation of the other passengers had violated his Sixth Amendment right was without merit absent a showing that:

> [T]he deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses. 450 U.S. at 873.

Petitioner's due process claim presents far greater deprivation in a completely different factual setting. Petitioner was denied access to the location of the alleged disqualifying acts. He was denied the opportunity to obtain, interview or even seek potentially favorable witnesses. Further, a unique 40-year time span exists in cases of this nature and the repressive Soviet influence is omnipresent. The government's own expert, Raul Hilberg, testified to the Russian refusal of inspection of documents. The Russian representatives at the Lutsk depositions forbade inquiry into two witnesses' involvement in admitted war crimes, their trial and records thereof.

While this Court has outlined the contours of due process violations in criminal contexts numerous times, *Washington, supra, Valenzuela-Bernal, supra; Mullaney v. Wilbur,* 421 U.S. 684 (1975); *Sandstrom v. Montana,* 442 U.S. 510 (1979); *Webb v. Texas,* 409 U.S. 95 (1972), the issue presented here is undecided and likely will recur in light of the increasing number of similar cases prosecuted by the Department of Justice's Office of Special Investigations.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that this Court should issue a writ of certiorari to the Court of Appeals for the Third Circuit to review the instant decision.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, EN BANC, FILED SEPTEMBER 23, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-1571

UNITED STATES OF AMERICA

v.

SERGE KOWALCHUK, a/k/a
SERHIJ KOWALCZUK

Serge Kowalchuk, Appellant

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civil No. 77-118)

Argued April 23, 1984
Before ALDISERT, *Chief Judge*,
WEIS and ROSENN, *Circuit Judges*

Argued In Banc May 6, 1985
Before ALDISERT, *Chief Judge*, SEITZ,
ADAMS, GIBBONS, HUNTER, WEIS, GARTH,
HIGGINBOTHAM, SLOVITER, BECKER,
MANSMANN, and ROSENN, *Circuit Judges*
Opinion Filed September 23, 1985

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OPINION OF THE COURT

ROSENN, *Circuit Judge.*

The Government instituted proceedings in the United States District Court to revoke and set aside an order admitting the defendant, Serge Kowalchuk, to citizenship because his naturalization had been illegally procured by concealment of a material fact or by willful misrepresentation.[1] In essence, the complaint alleged that the defendant failed to disclose in response to questions during the admissions procedure certain material facts: his membership in and employment by the Ukrainian militia and his residence in Lubomyl, Poland, during the war years 1941 and 1942. The complaint thus alleged that he entered this country unlawfully, procured his

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1. The Government filed its complaint under section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1451(a)(1982). The district court exercised jurisdiction pursuant to 8 U.S.C. §§ 1451 (1982) and 28 U.S.C. § 1345 (1982). This court has appellate jurisdiction under 28 U.S.C. § 1291 (1982).

permanent residence by fraud, and obtained his naturalization illegally.

The district court concluded that the defendant illegally procured his citizenship by entering this country with an invalid visa. It had two separate grounds for this conclusion. First, the defendant was not a genuine refugee of concern to the International Refugee Organization (IRO) and therefore was ineligible for admission under the Displaced Persons Act of 1948 (DPA), Pub. L. No. 80-774, 62 Stat. 1009 (1948) (codified at 50 App. U.S.C. §§ 1951-1965 (1982)). Second, the defendant was ineligible under section 10 of the DPA because he had made material misrepresentations to obtain the visa. The court accordingly revoked the defendant's citizenship and canceled his certificate of naturalization. We affirm.

I.

These revocation proceedings have their genesis in Serge Kowalchuk's activities shortly after the German military forces occupied Lubomyl in June 1941. Within two or three weeks after occupation, the Germans organized the Ukrainian schutzmannschaft.[2] Shortly thereafter, the defendant, then an able-bodied twenty-one year old man, suitable for military service, successfully sought out the collaborating mayor of the city for employment.

His first assignment was to the food distribution center serving government employees and the militia. He apparently was in charge, for the only other employee there was his assistant. In about one and one-half months, he was assigned to the

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2. The Lubomyl militia was officially known as the schutzmannschaft but was interchangeably referred to by the witnesses as the Lubomyl militia or police force. Prior to the schutzmannschaft, Lubomyl had no police force or militia.

schutzmannschaft headquarters across the street. He worked at the food distribution center in the mornings and at militia headquarters in the afternoons. Apparently impressed by his services, his superiors, in August 1941, sent the defendant, according to his testimony, elsewhere for special training at no expense to him. He was the only selectee from the Lubomyl area in a class of between 45 and 50. Upon the conclusion of his six months "additional training in local administration" and German language study, he received a certificate of completion and returned to his duties with the Lubomyl schutzmannschaft. His duties now were full time with the militia[3] until he fled Lubomyl with the retreating German army. As was the case with only the commandant and deputy commandant, defendant had his own private office and occupied these quarters for almost three years, the remainder of the Nazi occupation.

A.

To fully appreciate the defendant's role with the schutzmannschaft, an understanding of its function and its crucial importance to the Germans in carrying out the policies of the German army in the Ukraine may be helpful. The Germans organized indigenous personnel and formed them into auxiliary forces. They organized the Lubomyl schutzmannschaft into precisely such a body. These auxiliary forces enabled the Nazis to carry out their repressive and brutal policies and, at the same time, to wage an aggressive military campaign. As the district court found, "the occupying authorities did rely upon 'indigenous

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3. Mykola Kowalchuk, defendant's brother, testified that after his brother's supplemental training the defendant was given additional duties in the militia. Mykola further acknowledged at trial that in his 1981 deposition he testified that his brother at times wore a uniform, as did all the schutzmannschaft.

forces,' i.e., segments of the local population, to carry on the functions of government and to enforce the observance of restrictive edicts." *United States v. Kowalchuk*, 571 F. Supp. 72, 80 (E.D. Pa. 1983).

According to Professor Raul Hilberg, a leading authority on the Holocaust produced as an expert witness by the Government at trial, "the availability of an auxiliary force made of Ukrainian personnel was of crucial importance to the Germans, particularly because without them nothing at all could have been accomplished" in carrying out the policies of the German army in the occupied territories. Dr. Hilberg further testified that the sheer numbers of those killed in the liquidation of the Jews required the use of indigenous personnel. As the district court found, the magnitude of the brutal plan to liquidate in one day the 5,000 to 6,000 Jews living in Lubomyl required not only the German soldiers available, but also "significant numbers of Ukrainian militiamen to assist them in escorting the Jews from the ghetto to the execution site, and to prevent escapes." *United States v. Kowalchuk*, 571 F. Supp. at 81. The district court found

> What the evidence does establish with the requisite clarity and conviction is that the Lubomyl schutzmannschaft regularly and routinely enforced the martial law restrictions imposed by the Germans, including beating Jews found outside the ghetto after curfew, beating or severely reprimanding Jews who failed to wear the required insignia, assisting the Germans in confiscating valuables from the Jewish inhabitants, arresting and participating in the harsh punishment of persons involved in black-market activities or subversive activities hostile to the German occupation forces; and that the defendant was aware of the responsibilities

> assigned to the schutzmannschaft, and occupied a responsible position, albeit largely clerical, within that organization.
>
> . . . It is apparent . . . that members of the schutzmannschaft accompanied the German gendarmes on the many occasions disclosed by the testimony when persons were rounded up for forced labor, or arrested for various supposed infractions; that many of the persons thus apprehended were killed soon afterward; and that members of the schutzmannschaft were present during such executions.

571 F. Supp. at 81.

The district court concluded that although the evidence did not disclose, with the requisite clarity, that the defendant personally participated in any individual atrocities,[4] the court nonetheless found:

> [T]he evidence as a whole leaves little doubt that everyone associated with the schutzmannschaft, including the defendant, must have known of the harsh repressive measures which the schutzmannschaft were carrying out pursuant to German direction.

571 F. Supp. at 81.

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4. The government produced three non-Soviet witnesses who testified at the trial to the defendant's personal partici pation in atrocities in Lubomyl. Although the trial judge expressed confidence that these witnesses "testified honestly," he believed there were good reasons for questioning the reliability of their evidence. He viewed the testimony of six Soviet witnesses, who testified by videotape deposition about Kowalchuk's personal participation in atrocities in Lubomyl, with greater skepticism on the ground that they had been selected by the Soviet government and were under its control.

B.

When the Germans retreated from the Ukraine, the defendant elected to flee with them to Czechoslovakia.[5] The defendant and his younger brother, Mykola, ultimately arrived at a displaced persons camp near Salzburg, Austria. After spending four years there, the defendant applied in November 1947 for the necessary clearance certifying that he was a refugee "of concern" to the IRO. To obtain this certification, the defendant executed a required detailed personal history form (the CM/1 form). The defendant stated on this form that during the German occupation of the Ukraine, he lived in Kremianec, not Lubomyl, and that he worked there as a tailor. He concealed his service with the Lubomyl militia during the war. The district court found: "In his CM/1 personal-history form, the defendant intentionally misrepresented and/or concealed his residence in Lubomyl and his employment with the

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5. The record in this case leaves no doubt that the defendant departed voluntarily. The defendant testified that he left on the evacuation train with his family. (A 1335) (A 1170-1171) Mykola amplified this testimony on cross-examination with the following:

> Q. Sir, on the fragebogen . . . is there a section . . . in which you said you were forcibly transported by the Germans to Czechoslovakia?. You used the words "forcibly transported:" is that correct?
>
> A. Yes.
>
> Q. When in fact, as you previously testified, it was your own choice to go or not to go: is that correct?
>
> A. Yes.

(A 1173) In its brief to this court, the Government notes, among other misrepresentations of the defendant, "[he] also claimed that he had been forcibly transported by the Germans (GA 26, 30; Gov't Ex. 15A, ¶ 42) when in fact, as he admitted at trial, he voluntarily left Lubomyl (A 1255)."

town government there during the German occupation." 571 F. Supp. at 81.

The defendant then took the next step to gain admission to the United States as a permanent resident. For this purpose, he submitted an additional personal history questionnaire, the "fragebogen," together with his IRO documentation, to representatives of the United States Displaced Persons Commission (DPC). After the required investigation, he was duly certified in 1949 as meeting the eligibility requirements of the DPA. He then applied to the vice consul of the United States at Salzburg, Austria, and on December 29, 1949, he obtained a visa for admission to the United States for permanent residence. His petition for naturalization was granted on November 30, 1960, and he was admitted to citizenship.

The fragebogen opened with the admonition that "all questions must be answered and all information must be complete" and concluded with Kowalchuk's signature and his attestation that "if it is found to be untrue, incomplete, or misleading in any point, I may be denied entry into the United States."

Kowalchuk's responses to the fragebogen were false and misleading in the following respects: (1) Kowalchuk concealed his membership in the Ukrainian schutzmannschaft by falsely stating that he was a tailor's assistant in Kremianec from 1939 to 1944. (2) He concealed his residence in Lubomyl by falsely stating that he had lived in Kremianec from 1939 to 1944. (3) He only listed attendance at a trade school in Chelm, Poland, between 1936 and 1939 and concealed the fact that he was sent, as he now claims, for special schooling in 1942 and 1943 by the Nazi controlled government of Lubomyl. (4) He concealed his voluntary departure with the retreating German military forces from Lubomyl to Czechoslovakia, by falsely stating that he left his homeland because he was forcibly

transported by the Germans. (5) In response to a question concerning membership in any political, non-political, or paramilitary organization, he falsely replied "none," thereby concealing his membership in the schutzmannschaft.[6]

II.

On appeal, Kowalchuk argues that the district court committed reversible error in two respects: (1) its legal conclusions are not supported either by its own factual findings or by the evidence of record; and (2) his due process rights were violated because he was unable to investigate and interview "potentially favorable witnesses to him" residing in Soviet controlled territory.

The Government sued under section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1451(a) (1982) to have Kowalchuk denaturalized. This statute provides for the revocation of an order admitting a person to citizenship if such order and naturalization certificate "were illegally procured or were procured by concealment of a material fact or by willful misrepresentation." To obtain a grant of citizenship legally, an applicant must have resided in the country for at least five years after having been lawfully admitted for permanent residence pursuant to a valid visa. 8 U.S.C. §§ 1181(a) and 1427(a)(1) (1982).

Kowalchuk entered the United States under a visa issued pursuant to the DPA quota structure at that time. The DPA permitted increased immigration into

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6. Although the Government's complaint charged only misrepresentations concerning the defendant's militia membership and his residence in Lubomyl, it is undisputed that the defendant also failed to disclose on the fragebogen his special training and misrepresented his voluntary flight from Lubomyl with the Germans.

the United States of eligible persons displaced by World War II. To gain lawful admission to the United States for permanent residence under the DPA, the applicant first had to establish that he was a displaced person or a refugee of concern to the International Refugee Organization (IRO). See DPA, § 2(b). The IRO guidelines excluded from their concern any person who either "assisted the enemy in persecuting civil populations . . ." or "voluntarily assisted the enemy forces . . . in their operations against the United Nations." Finally, the DPA provided that anyone who made a willful misrepresentation for the purpose of obtaining a visa would be inadmissible. Thus, a person not eligible for refugee or displaced person status under the IRO Constitution or guidelines or who had made a material misrepresentation on his visa application could be denaturalized under section 1451(a). *See Fedorenko v. United States*, 449 U.S. 490 (1981).

III.

Because citizenship in this nation is a precious right, once conferred, the Government bears "a heavy burden of proof" in a denaturalization proceeding. *Costello v. United States*, 365 U.S. 265, 269 (1961), *quoted in Fedorenko v. United States*, 449 U.S. at 505. To revoke a grant of citizenship, the evidence must be clear, unequivocal, and convincing. *Schneiderman v. United States*, 320 U.S. 118, 125 (1943); *see also United States v. Riela*, 337 F.2d 986, 988 (3d Cir. 1964). "Any less exacting standard would be inconsistent with the importance of the right that is at stake . . . ." *Fedorenko v. United States*, 449 U.S. at 505-06.

Although the burden of proof upon the Government in a denaturalization proceeding is heavy, a certificate of citizenship is not immune from challenge. It is "an instrument granting political

privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured." *Johannessen v. United States*, 225 U.S. 227, 238 (1912). As the Court in *Fedorenko* aptly observed, the cases have also recognized that an applicant for citizenship must *strictly comply* with all the congressionally imposed prerequisites to the acquisition of citizenshp.

> Failure to comply with any of these conditions renders the certificate of citizenship "illegally procured," and naturalization that is unlawfully procured can be set aside. As we explained in one of these prior decisions:
>
> > An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. . .
> >
> > • • • •
> >
> > "No alien has the slightest right to naturalization unless all statutory requirements are complied with: and every certificate of citizenship must be treated as granted upon condition that the government may challenge it . . . and demand its cancellation unless issued in accordance with such requirements."

Fedorenko, 449 U.S. at 506 (quoting *United States v. Ginsberg*, 243 U.S. 472, 475 (1917)) (additional citations omitted).

IV.

Kowalchuk's first step to lawful entrance into the United States as a permanent resident under the DPA required that he establish himself as a displaced person or refugee of concern to the IRO. The district

court found that the defendant was not "of concern to the IRO" because he "voluntarily assisted the enemy forces," a determination that, under the Constitution of the IRO, would have excluded the defendant from eligibility as a bona fide refugee or displaced person. Section 2(b) of the DPA incorporated the definition of a displaced person set forth in the IRO Constitution. Michael R. Thomas, chief eligibility officer for the IRO in 1948, and co-author of the *IRO Manual for Eligibility Officers*, testified that membership in a police force or militia raised a presumption of voluntary assistance to the enemy. These forces "freed the enemy from using its own people." A. P. Conan, employed by the DPC between 1948 and 1952, served a stint as a senior officer in charge of the commissioner's activities for the British Zone. He essentially reviewed the eligibility of those whose applications the Commission proposed to reject. He testified that an applicant who had served in the Ukrainian schutzmannschaft would have been rejected unless he overcame the presumption against his eligibility by showing that his service was involuntary, and that he had not committed atrocities or persecuted any person on the ground of religion, race, or national origin.

Professor Raul Hilberg testified that the "German forces were totally insufficient to undertake the policies of Nazi Germany in the occupied territories," and that the assistance of an auxiliary force of Ukranian personnel was "of crucial importance. The importance of those forces was acknowledged by the IRO, which in Part II Appendix IV of Provisional Order 42 defined "enemy forces" to include "police, paramilitary and auxiliary organizations." The district court also observed:

> it is impossible to avoid the inference that the defendant had found favor with the Nazi occupiers

of Lubomyl, and was being trained for even greater service in the future.

If the defendant's activities had been innocuous as he claims, there would have been little reason for him to leave Lubomyl with the retreating Germans.

571 F.Supp. at 76.

The provisions of the IRO constitution,[7] and the testimony of Thomas, Conan, and Hilberg support the district court's findings and convincingly demonstrate that the defendant's voluntary membership in the Ukrainian schutzmannschaft constituted voluntary assistance to the enemy.

The district court also found that Serge Kowalchuk "assisted the enemy in persecuting civilian populations," an alternative basis for its conclusion that the defendant was not a bona fide refugee of concern to the IRO. We do not need to reach this issue. Thus, the defendant's citation to *U.S. v. Sprogis*, No. 84-6223 (2d Cir., May 31, 1985) is irrelevant.

V.

A grant of citizenship may also be revoked if it was "illegally procured or . . . procured by concealment of a

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7. The Constitution of the IRO, Annex I-Part II, reprinted in Chapter VI of the Manual, enumerates categories of persons who will not be the concern of the organization. Section 20 thereof excludes persons who can be shown "to have voluntarily assisted the enemy forces ... in their operations against the United Nations." A reading of sections 22 and 27 reveals that "assistance to the enemy shall be presumed to have been voluntary" by a member of either "the police, para-military [or] auxiliary organisations." Once an applicant has joined one of such organizations, the only answer for an applicant under the language of section 27 is "to disprove the voluntary nature of his enlistment."

material fact . . . ." 8 U.S.C. § 1451(a) (1982). Unless the preconditions to naturalization are met, citizenship is "illegally procured" and may be revoked. *Fedorenko v. United States*, 449 U.S. 490, 506 (1981). To obtain a grant of citizenship, an applicant must have entered the United States pursuant to a valid visa. An applicant ineligible under the law may not obtain a valid visa.

Kowalchuk obtained his visa and entered this country under the provisions of the DPA. The Act enumerated certain automatic exclusions from eligibility. Section 10 stated:

> No eligible displaced person shall be admitted into the United States unless there shall have first been a thorough investigation and written report . . . regarding such person's character, history, and eligibility under this Act. *The burden of proof shall be upon the person who seeks to establish his eligibility* under this Act. Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States. (Emphasis added.)

In this case, it is undisputed that Kowalchuk "wilfully ma[d]e a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person. Kowalchuk argues, however, that the misrepresentations about his wartime activities were not "material."[8] We disagree.

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8. It is worth noting that the statute on its face does not require a "material" misrepresentation to render an applicant ineligible. In Fedorenko v. United States, 449 U.S. 490, 507 (1981), the Court interpreted the statute to include a materiality requirement. The Court analogized the DPA to the denaturalization statute, 8 U.S.C. § 1451(a) (1982), which authorizes denaturalization for "conceal[ment] of a material fact or . . . willful

A.

In *Chaunt v. United States*, 364 U.S. 350 (1960), the Government attempted to revoke the petitioner's citizenship on the ground that he had made several misrepresentations in his application for citizenship. The district court cancelled the petitioner's naturalization, and the court of appeals affirmed. The Supreme Court reversed, finding that Chaunt's misrepresentations were not material. At issue was Chaunt's failure to reveal arrests that were made more than five years prior to the time of naturalization. The Court stated that "[t]he totality of the circumstances surrounding the offenses charged makes them of extremely slight consequence," *id.* at 354, and therefore would not of themselves have provided a ground to deny citizenship. The Court also rejected the Government's argument that had it known of the arrests it might have investigated Chaunt further and might well have discovered a link between him and the Communist Party, explaining that the information that Chaunt had disclosed revealed a more substantial nexus with the Communist Party than the undisclosed arrests did. *Id.* at 355.[9] The Court then concluded that

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misrepresentation." In *Fedorenko*, the Court attached the materiality standard to the DPA even though there was no mention of it in the statute. The DPA was amended in 1952 to exclude any alien who seeks to procure a visa "by willfully misrepresenting a material fact." Immigration and Nationality Act of 1952, § 212(a)(19), Pub. L. No. 82-414, 66 Stat. 163, 183 (codified at 8 U.S.C. § 1182(a)(19) (1982)). The amendment is based on the belief that misrepresentations having no bearing on the material issues involved should not serve as a basis for exclusion. H.R. Rep. No. 1365, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1704.

9. The Court, however, stated: "Had that disclosure not been made in the application, failure to report the arrests would have had greater significance. It could then be forcefully argued that

the decision to denaturalize Chaunt should be reversed because

> the Government . . . failed to show by "clear, unequivocal, and convincing" evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

Id. at 355.

The Court in *Chaunt* thereby devised a two-pronged test for materiality in denaturalization cases. Under the first prong, the Government tust prove that a truthful answer to a question "would have warranted denial" of the application. In the alternative, the Government may prevail under the second prong. The second prong deals with a situation in which the truthful answer to a question would not by itself warrant the disqualification of the applicant. The Government may still demonstrate that the misrepresentation is material if it shows that the truthful answer "might have been useful" in an investigation of the applicant "possibly leading to the discovery of other facts warranting denial of citizenship." *Chaunt*, 364 U.S. at 355.

In *United States v. Fedorenko*, 449 U.S. 490 (1981), the Supreme Court affirmed the court of appeals decision ordering Fedorenko's denaturalization. Without deciding the question of whether the *Chaunt* materiality test also governed false statements in visa applications, the Court reasoned: "At the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." *Id.* at 509.

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failure to disclose the arrests was part and parcel of a project to conceal a Communist Party affiliation." 364 U.S. at 355.

In *United States v. Koziy*, 728 F.2d 1314 (11th Cir.), *cert. denied*, 105 S. Ct. 130 (1984), the district court found that Koziy had failed to reveal in his visa application that he had been a member of the Ukrainian police. In affirming the revocation of Koziy's citizenship, the court of appeals stated:

> The district court found that Koziy never disclosed his membership in the Ukrainian Police Force. It ruled that if he had disclosed his connection with the police force in his visa application, his application would have been rejected outright . . . . These findings are not clearly erroneous.

Id. at 1320.

B.

Had Kowalchuk revealed the facts which he suppressed on December 29, 1949, the day he obtained his visa, those facts would have warranted the denial of his visa and thereby precluded him from obtaining citizenship. As previously noted, the defendant willfully concealed his voluntary membership and employment in the Ukrainian militia/police force, his residence at Lubomyl, his attendance at the special training school during the German occupation, and his voluntary flight to Czechoslovakia with the retreating German military forces. *See* footnote 6 *supra*. As Michael R. Thomas, chief eligibility officer for the IRO, testified, *supra*, p. 13, the DPC would accept only those refugees who were eligible for IRO assistance, and that an applicant who had voluntarily assisted the enemy force would be ineligible.[10] An

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10. George L. Warren, former deputy senior officer for the United States Displaced Persons Commission in Salzburg, personally certified Kowalchuk's eligibility certificate. Warren testified that he would not have signed the certificate had he been aware that Kowalchuk was alleged to have been a member of a

applicant who reported that he belonged to a police force or militia (regardless of his function in the organization) would have been presumed to have voluntarily assisted the enemy. The applicant had the burden of proving eligibility for IRO assistance and his CM/1 form became the basic document upon which the field officer depended.

Conan, the DPC's senior reviewing officer of proposed reject applications for entry into the United States, also testified, *supra*, p. 13. He stated that an applicant who reported that he had served in the Ukrainian schutzmannschaft would have been rejected unless he were able to prove that he served involuntarily and that he was not involved in persecution of civilians. This testimony is fully consistent with the *IRO Manual for Eligibility Officers*. A schutzmannschaft member who was unable to overcome the presumption would have been rejected even though the Ukrainian schutzmannschaft was not on a list of inimical organizations (A 1512-13). Government exhibits demonstrate that applications in fact had been rejected in 1952 by the DPC under section 13[11] of the Act on the ground of such membership. Moreover, Conan testified that applications of members of the Ukrainian schutzmannschaft would have been rejected prior to the 1950 amendment of the DPA.

Ukrainian police unit. If the unit were not on a list of ineligible organizations, he testified that he would have referred the application to Frankfurt for review and further investigation.

11. Section 13 of the DPA provides: "No visa shall be issued under the provisions of the Act to any person who is or has been a member of, or participated in, any movement which is or has been hostile to the United States . . . ." This section provides another independent ground for ineligibility for a visa in this case and was the subject of the Government's amended complaint.

John Chapin, American vice-consul in 1948 in Salzburg, Austria, testified that the IRO documents, the attested fragebogen, and the DPC's investigation and report accompanied the application for a visa. The standard procedure in every case was for the American vice-consul to read the fragebogen, personally interview the applicant concerning wartime residence and occupation, and to have the applicant swear to the truth of all the statements in the application, including the fragebogen. (A 1032-33) Close attention was paid to the applicant's occupation and residence during the war years and the applicant had the burden under the law of proving eligibility for a visa. Persons who had served in the Ukrainian police or militia would have been ineligible.

Whatever the defendant's motivation,[12] the misrepresentations and concealment were material to the IRO's determination in 1947 of whether Kowalchuk was a bona fide refugee and "of concern" to the IRO. They were plainly material to the vice consul's determination in 1948 that Kowalchuk was eligible for admission to the United States as a permanent resident. The evidence of willful misrepresentation, concealment, and materiality is clear, convincing, and unequivocal. Regardless of whether the defendant personally participated in the atrocities and brutalities committed by the Lubomyl schutzmannschaft, the district court found that the "defendant was aware of the responsibilities assigned to the schutzmannschaft, and occupied a responsible position, albeit largely clerical, within that organization." 571 F. Supp. at 81.

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12. The defendant testified that he made the misrepresentations of residence to the IRO to prevent possible retaliation by the Soviets to his parents. However, his brother, Mykola, previously had stated truthfully his residence in Lubomyl to the IRO and the defendant knew this.

Truthful answers on the CM/1 and the fragebogen would have prevented the defendant from obtaining a visa under the DPA.

Because we conclude that disclosure of the true facts concerning defendant's wartime activities would have made him ineligible for a visa, we find it unnecessary to resolve the question of whether defendant's misrepresentations were material under the second prong of the *Chaunt* test. *See Fedorenko v. United States*, 449 U.S. at 509.

VI.

The defendant also contends that he was denied due process. He asserts that when his counsel was in the Soviet Union for the depositions of the government witnesses, the Soviet Union denied him the opportunity to visit Lubomyl to investigate or interview potential witnesses. However, as the district court observed, Soviet Russia also imposed the same limitations upon Government counsel. The defendant does not make any claim that he was deprived of any specific evidence or testimony. He makes no showing that any testimony has been excluded that "would have been material and favorable to his defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

At one point, defense counsel informed the Government that he knew of eighteen witnesses in the Soviet Union whom he would like to call. Yet, he made no request to interview any of them or to depose them. On the other hand, the Government by letter dated March 12, 1980 informed defense counsel that it was requesting permission from the Soviet Union to bring the deposed witnesses to the United States to testify and offered "to make a similar request on behalf of the Kowalchuks that specific witnesses be produced to testify on their beha..." The defense failed to follow

through on the Government's offer. Their request to interview witnesses was made only after defense counsel was in the Soviet Union and even then it was made informally. Moreover, the trial court's factual conclusions are based upon the testimony of the defendant and his witnesses or other evidence not inconsistent with that testimony. 571 F.Supp. at 80.

We see no merit to the defendant's due process contention.

VII.

In sum, the district court revoked the defendant's citizenship on the following independent grounds: (1) the defendant was not a genuine refugee "of concern" to the IRO and therefore was not entitled to the benefits of the Displaced Persons Act because (a) because as a member of the schutzmannschaft he voluntarily assisted the enemy forces in their operations against the United Nations, (b) in such capacity he assisted the Nazis in persecuting civilians, and (2) the defendant illegally obtained his visa because he made willful material misrepresentations to gain admission to the United States as a permanent resident.

Although we do not decide whether the record supports the district court's conclusion that the defendant assisted the enemy in persecuting civilians, we hold that the record fully supports the trial judge's findings and his conclusions concerning the defendant's voluntary assistance to enemy forces and his willful material misrepresentations.

Accordingly the judgment of the district court will be affirmed.

ALDISERT, *Chief Judge*, with whom WEIS, *Circuit Judge*, joins, and with whom Hunter and Mansmann, *Circuit Judges* join in parts V-IX, dissenting.

Should this court strip American citizenship away from Serge Kowalchuk, a member of a known Ukrainian anti-Communist family, and possibly deport him to the Soviet Union based on a denaturalization proceeding initiated by information that first appeared in the Soviet newspaper, *Trud*, the official organ of the notorious state security police, the KGB? That is the overarching question implicated in this appeal. My answer resounds in the negative. Accordingly, I dissent.

I.

Appellant was born in Kremianec in the Ukraine in 1920, and later moved to Lubomyl, also in the Ukraine. Shortly after the invasion of Russia in 1941, the Nazis overran Lubomyl and took control of the local government. During the period of Nazi occupation, appellant worked as a clerk for the Lubomyl police (also known as the schutzmannschaft or militia) and did food distribution work. As a police clerk he occasionally wore a uniform, was aware of the restrictions placed on Lubomyl Jewish residents, and typed duty rosters which assigned the other militia men to patrol the Lubomyl Jewish ghetto. As in other areas under Nazi occupation, the Lubomyl Jews were subject to persecution, abuse, degradation, and eventually massive exterminations. At the time when the Jewish population in Lubomyl was exterminated, however, appellant was not in the village; he was receiving special training at German expense at a school in another town. Moreover, I am impressed that no evidence establishes that appellant performed any militia patrol duties himself or that he was engaged directly in persecuting the Jewish people.

In 1944, appellant moved west. His family's ardent anti-Communist feelings were generally well known. Obviously he did not wish to remain or return to Lubomyl, then under Soviet control. He fled the advancing Russian armies,[1] and eventually entered a displaced persons' camp in Austria. To determine whether the International Relief Organization of the United Nations (IRO) could classify him as either a refugee or displaced person, Kowalchuk filed a form CM/1. On this form, he stated that during the war he lived in Kremianec, not Lubomyl, and that he worked as a tailor, not for the Lubomyl militia. This, of course, was not true. He later explained that he lied on his CM/1 form because he was fearful of Soviet reprisals against his family, because of his antipathy to the Communists, and because he did not wish to be returned to the Soviet Union. He did not know precisely where all members of his family were located and he knew the Soviet Mission would have access to the information on the CM/1 form. Kowalchuk's

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1. The majority allege that, as the Russian army approached Lubomyl, appellant and his family "departed voluntarily," typescript at 7 n.5, and that he concealed his "voluntary departure with the retreating German military forces." *Id.* at 9. The district court found this evidence equivocal at best, stating:

> If the defendant's activities [in the Lubomyl militia] had been as innocuous as he claims, there would have been little reason for him to leave Lubomyl with the retreating Germans. It must be admitted, however, that this argument is considerably weakened by the fact that the defendant's parents, at least, had valid reasons for leaving at that time, and it would be quite understandable that the family would wish to remain together. Moreover, flight from the advancing Russian army was a widely prevalent mode of behavior.

United States v. Kowalchuk, 571 F. Supp. 72, 76 (E.D. Pa. 1983).

misrepresentations as to his residence and employment during the war, set forth on the CM/1 form, were transcribed or appended onto his United States visa application. He was granted a visa in 1949.

In its rendition of the facts, the majority attempt to paint a much harsher picture both of the Lubomyl militia in general and appellant's wartime activities in particular. I quickly recognize that it is always difficult to reconstruct what actually happened at any point in history, and more difficult still when the events of consequence occurred during totally devastating wartime conditions, in enemy territory, over forty years ago. Indeed, this realization lies at the core of the due process issues which I will soon discuss. The task is further complicated here because, as noted by the district court, "unlike virtually every other reported denaturalization case, there is in this case not one scrap of documentary evidence relating to the pertinent events." *Kowalchuk*, 571 F. Supp. at 75. In all cases, an appellate court should adhere closely to the district court's properly found facts based on that court's determinations of witness credibility: under these special conditions, this requirement assumes a fortiori proportions.

What must be emphasized is that our concern here is with evidence found credible by the fact finder below, not with testimony offered. Our concern here is with Kowalchuk's personal conduct, not the general conditions in war-torn Lubomyl, as horrible as they no doubt were. Our concern here is his role in the Lubomyl militia, and the effect of that role on his grant of a visa.

II.

Kowalchuk raises two arguments in his appeal from the district court's judgment that ordered denaturalization: (1) that the district court's legal conclusions that he violated the Displaced Persons' Act

(a) "voluntarily assisted the enemy forces," (b) "assisted the enemy in persecuting civil populations," and (c) wilfully made misrepresentations in his visa application; and (2) that his due process rights were violated because present Soviet control of the area where the alleged conduct took place essentially prevented him from presenting an effective defense.

Thus, the statutory question presented for disposition is whether in applying 8 U.S.C. § 1451(a), the district court erred in revoking Kowalchuk's naturalization on three grounds: (1) that as a member of the Lubomyl militia he voluntarily assisted the enemy; (2) that as a member of the Lubomyl militia he assisted the Nazis in persecuting civilian populations; and (3) that he made a willful, material misrepresentation of fact by lying about his wartime residence and employment. *See United States v. Kowalchuk*, 571 F. Supp. 72, 82-83 (E.D. Pa. 1983). But Kowalchuk's due process claim, deemed so insignificant by the majority that they summarily dismissed it, *see* typescript page 22-23, is to me so important an issue that I choose to address it first.

III.

Before analyzing the specific legal questions, I must describe conditions in Europe and in the displaced persons camps at the time Kowalchuk applied for the visa application. I start with V-E Day, May 8, 1945. Notwithstanding the presence of European nation-states, the power to rearrange the map of Europe had passed to the United States and the Soviet Union. The Hitlerian Reich had come to an end. At its peak the Nazi empire stretched from the French port of Brest to the Caucasus and from the tip of Norway to the border of Egypt. In the six-year struggle to bring down that empire, an estimated 40 million Europeans lost their lives -- in combat, under the

bombs that obliterated cities, through Hitler's methodical genocide, or simply from hunger, cold and disease.

In Germany, the state had ceased to exist. A mass of civilians, freed prisoners and the first waves of 13 million refugees from Eastern Europe wandered the country. Nearly 8 million Germans were homeless. It was a time when people bartered household necessities for food and clothing and often subsisted on little more than 1,000 calories a day.

The onset of a chill between the Soviets and Western allies sealed the division of the country between two hostile occupation zones. By 1947 it was becoming clear that Stalin had no intention of fulfilling his promise to Roosevelt and Churchill at Yalta to hold free elections in Poland. Where the Red Army stood, Soviet power reigned and probed westward. A Communist insurgency, supported from bases in Bulgaria, Albania and Yugoslavia, threatened the vulnerable British-backed monarchy in Greece. Soviet pressure mounted against Turkey for control of the Black Sea straits.[2]

Such were the political clouds that hovered over the displaced persons' camp when Kowalchuk applied for his visa. Refugees in Central Europe's camps were pawns in a vicious political struggle acted out by the two superpowers in the late forties in central Europe. The die having been cast in both the west and in the east by the occupying armies, Central Europe remained the primary political battleground for almost a decade after V-E Day. American and Soviet diplomatic armies postured eyeball-to-eyeball. The *de facto* division of Germany had already taken place but the Berlin airlift, and the Berlin wall were yet to come.

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2. *See* Special Report, Forty Years After V-E Day, Time Magazine 16-23 April 29, 1985.

Austria, the precise location of Kowalchuk's visa application, was still a pawn between the West and the East, and was yet to be the subject of the later checkmate which conferred upon that country an unallied, neutral status.

As the saying goes, the rest is history. The cold war has continued between the United States and the Soviets for over 40 years with charge and countercharge. The Soviets have continued to make use of its state security police, the KGB, within and without the Soviet Union; its espionage operations making devastating infiltrations within the United States in 1985 in the U.S. Navy and the Federal Bureau of Investigation. For reasons that I refuse to regard as completely altruistic, the Soviet KGB has singled out American citizen Serge Kowalchuk for immediate attention by our government, in a stream of extravagant accusations subsequently not proved in the district court. Should these denaturalization proceedings be successful, however, and subsequent deportation to the Soviet Union be effected (ostensibly to the Ukraine), I am certain that the KGB will have a welcoming committee awaiting the return of a member of a family that dared defy Communist dogma in the Ukraine in the early forties. With such a background, it is understandable why the Soviet authorities denied Kowalchuk the opportunity to conduct even a primitive preparation of a defense. With such a background it should come as no surprise that this Soviet conduct denied Kowalchuk the most basic of due process rights.

IV.

Although I recognize that we would normally not address the constitutional issue if an independent statutory ground supports the outcome, I feel that under these particular circumstances the

constitutional violation is so compelling that it requires discussion first. Our Department of Justice required Serge Kowalchuk to defend himself against charges based on events that occurred over forty years ago in the Soviet Union. John Rogers Carroll, an experienced Philadelphia trial lawyer, represented him, but was not able to obtain, interview, or even seek witnesses in the Soviet Union. Attorney Carroll was permitted to travel to the Soviet Union, but, incredibly, was allowed to interview only those witnesses obtained and controlled by the Soviet government. Mr. Carroll, Kowalchuk's attorney, was also not permitted to visit Lubomyl, for the purpose of either obtaining witnesses or collecting physical evidence; incredibly he was denied access to the very town where the government claims the illegal conduct of Kowalchuk took place. App. at 1689. The Soviets sowed the seeds of these proceedings by blasting away accusations against Kowalchuk in Trud, the house organ of the KGB.

When this American citizen, Kowalchuk, attempted to prepare a defense to these Soviet-instigated charges, he found the Soviet fox to be the keeper of the chicken house. Kowalchuk's contention, therefore, goes far beyond an argument that he was denied the opportunity to interview potential witnesses. Rather, it is that he was denied the opportunity to develop a meaningful defense of any type.[3] Because I believe that the right to present

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3. As Mr. Carroll stated in the district court:

> What we have [are] handouts of the NKVD [the KGB]. That is all that the Government has. That is all that the Russians will give.
>
> Our complaint due process-wise doesn't say that we are being deprived of specific witnesses. It says a lot more. It says . . . we couldn't name these people because of our fears of what would happen to them.

witnesses and establish a defense is a fundamental element of due process of law, I also believe that revocation of Serge Kowalchuk's citizenship, under the circumstances here, constitutes a blatant violation of a very precious fundamental right.

A.

In *Washington v. Texas*, 388 U.S. 14 (1967), the Supreme Court observed:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the

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> The situation is backed up by the testimony of Professor Bilinsky who testifies as an expert, Your Honor - and there is no contradiction or quarrel about this -- that what would happen to those people if we went and tried to use them as witnesses would be unspeakable. Their lives would be made miserable if they were to try to help somebody who, a year ago this week, they described me as the advocate of the Nazi murderer Kowalchuk in their papers somewhat ahead of adjudication.
>
> But, if your Honor please, that betokens the attitude that we are faced with and the utter futility of attempting - they told us when we went there that Lubomyl is a closed town. That means foreigners are not allowed. It means really that arbitrarily the Russian government is saying, "You can't go in there even if you wanted to."
>
> I tried to reconstruct a map of Lubomyl which Mykola Kowalchuk described to Your Honor as having an elevation which made it impossible for some of the witnesses -- particularly these Israeli witnesses whose vantage point were pinned down in their testimony to see what they claimed they say. I couldn't even verify that by a visit to Lubomyl much less could we make any inquiry

App. at 1654-55.

> right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 19.[4]

Numerous other cases have established the contours of the right to present witnesses and to establish a defense. For example, the Court has held that a judge's stern warning of the consequences of perjury to a defense witness, which caused the witness not to take the stand, deprived the defendant of his due process right to offer the testimony of witnesses. *Webb v. Texas*, 409 U.S. 95, 98 (1972). Likewise, we have held that the removal of exculpatory evidence by police

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4. In explaining why this "right is a fundamental element," Chief Justice Earl Warren, speaking for the Court, explained:

> Joseph Story, in his famous Commentaries on the Constitution of the United States, observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all. Although the absolute prohibition of witnesses for the defense had been abolished in England by statute before 1787, the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.

Washington, 388 U.S. at 19-20, citing 3 Story, Commentaries on the Constitution of the United States §§ 1736-38 (1st ed. 1833).

"den[ies] a defendant an opportunity to present competent proof in his defense [and] constitutes a violation . . . of due process." *Henderson v. Fisher*, 631 F.2d 1115, 1119 (3d Cir. 1980).

Although the *Washington* doctrine was enunciated in the context of a criminal case, denaturalization cases are akin to criminal proceedings, especially in the burden of proof placed on the government. *See Fedorenko v. United States*, 449 U.S. 490, 505 (1981); *Costello v. United States*, 365 U.S. 265 (1961). "American citizenship is a precious right. Severe consequences may attend its loss, aggravated when the person has enjoyed his citizenship for many years." *Costello v. United States*, 365 U.S. 265, 269 (1961). In *Klapprott v. United States*, 335 U.S. 601, *modified*, 336 U.S. 942 (1949), in an opinion announcing the judgment of the Court, and in which three other justices were at least in substantial accord, Justice Black stated:

> Denaturalization consequences may be more grave than consequences that flow from conviction for crimes. . . . This court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty. The consequences of such a deprivation may even rest heavily upon his children. . . . As a result of the denaturalization here, petitioner has been ordered deported. "To deport one who so claims to be a citizen, obviously deprives him of liberty . . . . It may result also in loss of both property and life; or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284. Because denaturalization proceedings have not fallen within the technicial classification of crimes is

> hardly a satisfactory reason for allowing denaturalization without proof while requiring proof to support a mere money fine or a short imprisonment.
>
> Furthermore, because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt. *Schneiderman v. United States*, 320 U.S. 118, 158. This burden is substantially identical with that required in criminal cases -- proof beyond a reasonable doubt.

Id. at 611-12. The fragmented nature of the *Klapprott* decision offers no solace to the government here because in *United States v. Riela*, 337 F.2d 986, 988 (3d Cir. 1964), this court adopted Justice Black's reasoning. It cannot be seriously challenged that due process guidelines applicable in a criminal context must also guide our decision here.

B.

Several important factors underscore the severity of the due process violation involved here:

1) the origination of the charges in a KGB-controlled publication;

2) the inability of Kowalchuk to ascertain, locate or even interview favorable witnesses in Lubomyl;

3) the unlikelihood of obtaining reliable testimony from the Soviet witnesses.

The KGB's unique role in the Soviet system as the guard dog of the political power structure is well

used accusations of war crimes as a means of embarrassing and harassing Ukrainian emigres whom they view as anti-Communist or as advocates of Ukrainian nationalism. Professor Bilinsky, a Polish immigrant and expert on Soviet and Eastern European Studies, testified in his deposition that: "[T]he Soviet government, including the Soviet Ukrainian government, wants to discredit the Ukrainian emigres. They want to discredit them in the eyes of the other Soviet Ukrainians. They want to discredit them in the eyes of American citizens, and they want to discredit them in the eyes of the American Government." App. at 1386.[6] Professor Raul Hilberg, one of the Government witnesses, acknowledged that Soviet authorities tightly control all access to all documents concerning World War II war crimes. *Id.* at 827-30. Additionally, testimony of the defense witnesses established that

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6. See also the testimony of Nina Koranvaska, a Ukrainian immigrant and doctor of microbiology, who now works for the Ukrainian World Congress for Freedom of Human Rights, and testified at trial as follows:

> Q What is the interest of the Soviet Government in Ukrainian immigrants?
>
> A Very great.
>
> Q What is the nature of that? How does the Soviet Government look upon a Ukrainian immigrant?
>
> . . . .
>
> THE WITNESS: [The] Ukraine is occupied factually by the Soviet Union and the immigrant beyond the borders, beyond the Soviet Union are the only representatives that spread the truth about Ukrainian position there.
>
> Only lately did the Ukrainian immigrants begin to tell the story about Ukraine in Soviet Union. Therefore, the Soviet Union is interested to destroy the political image of Ukrainian immigrants outside of its borders.

Soviet authorities routinely manipulate witnesses, especially in political trials, and that any efforts by defendant to obtain favorable evidence from Soviet citizens would endanger those citizens' safety. *Id.* at 1401.

Other courts have expressed hesitancy in crediting evidence from Soviet sources. In *United States v. Kungys*, 571 F. Supp. 1104 (D.N.J. 1983), a case involving facts that are quite similar to those of this appeal, the court emphasized the Soviet's motivation for discrediting emigres:

> Despite Soviet conquest [of Lithuania] there remain strong nationalistic feelings and continuing allegiance by a significant portion of the population to the Roman Catholic Church. The attempts by Soviet authorities to stamp out these influences and to create the myth of historic friendship between the people of the Soviet Union and its various national groups are weakened by the presence abroad of large groups of emigres who experienced personally the effects of Soviet occupation and who help keep alive Lithuanian national and religious convictions.
>
> . . . .

BY MR. CARROLL:

Q Is it in the interest of the Soviet Government to portray Ukrainian immigrants as anti-Semitic?

A There is no question about it, since the Soviet Government even in the Ukraine has a policy of anti-Semitism in its country. So therefore they continue the same policy which concerns the immigrants outside of the borders of Soviet Union.

App. at 1352-53.

known.[5] In the twenties and thirties, the KGB was the principal weapon of Stalin's cruel rural collectivization campaign, which Stalin later admitted claimed ten million victims. Stalin also used the organization with ruthless effectiveness in crushing political opposition in the purges of the thirties and forties. Aleksander I. Solzhenitsyn's masterpiece, *The Gulag Archipelago* vividly chronicles the brutal role this organization performed during that period. See also R. Medvedev, *Let History Judge* (Knopf, New York 1971), Chapter VII, "Illegal Methods of Investigation and Confinement" for a Soviet-published account of the brutal methods employed by the KGB. The Ukraine, because of its resistance to the Communists, bore the brunt of these campaigns. After World War II, the terror continued: "A particular area of secret police concern was the resurgent nationalism among the minority nationality groups of the Soviet Union. In the Ukraine, Byelorussia, and elsewhere, the war years, despite the tragic experiences of the German occupation, had brought an opportunity to express national

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5. "KGB" is the acronym for the Komitet Gosudarstvennoy Bezopasnosti, or translated, the Committee for State Security. Since its inception on December 20, 1917, as the Cheka, the organization has been known as the GPU, OGPU, GUGB, NKVD, NKGB, and the MGB. The original Soviet constitution vested the KGB's predecessor with the broad duty "to unite the revolutionary efforts of the Union Republics in the struggle against political and economic counterrevolution, espionage and banditism." This broad duty was accompanied by equally broad powers; because the organization's leaders took their orders directly from the Communist Party leadership, they were essentially beyond restriction by any other Soviet laws. Thus, "whoever controlled the central Party organization had in the secret police an investigative and punitive arm of tremendous scope and power." S. Wolin & R. Slusser, *The Soviet Secret Police* (Greenwood Press, Westport, Conn. 1957).

consciousness to a degree not permitted under Soviet rule. . . . The secret police assumed the task of . . . combatting expressions of nationalism in intellectual life." S. Wolin & R. Slusser, *supra*, at 23. *See also* A. Romanov, *Nights are Longest There. A Memoir of the Soviet Security Services* 116-17 (Little, Brown & Co., Boston 1972).

Also, the KGB's operations range far beyond Soviet borders; the KGB routinely operates throughout the world conducting intelligence operations, inciting revolutionary activities, and acting as the Party's enforcement agency. *See* J. Barron, *KGB, The Secret Work of Soviet Secret Agents* 1-28 (Readers Digest Press, New York 1974)(hereinafter cited as *KGB*). For example, "[a]pproximately 400 officers of the KGB and its military subsidiary, the GRU, are permanently stationed in New York, Washington and San Francisco, to spy and conduct Active Measures. Their labors are abetted by hundreds more officers of the Cuban, Bulgarian, East German, Polish, Czechoslovakian, and Hungarian intelligence services, which function as KGB auxiliaries." J. Barron, *KGB Today: The Hidden Hand* 195 (Readers Digest Press, New York 1983). Frequently, the KGB's continuing campaign against Ukrainian nationalists has reached beyond the Soviet borders, with lethal effect. *See KGB*, *supra*, at 311-16. Therefore, the KGB's involvement and assistance in the origination and the subsequent prosecution of these charges makes their authenticity highly suspect.

Additionally, at his trial, Kowalchuk presented the testimony of Nina S. Koranvaska, Ph.D., Simas Kudirka, and Professor Yaroslav Bilinsky to support his claim that because of the political and legal system of the U.S.S.R., he was not able to obtain, interview, or even seek witnesses in his favor in the Soviet Union. The testimony of Koranvaska and the other defense witnesses established that the Soviet government has

> In 1964 there was formed the Latvian Committee for Cultural Relations of Latvians abroad, and during 1970-76 Lesinskis [a Latvian member of the KGB who defected in 1978] was chairman of its presidium, receiving instructions from the KGB. Its objective was also to discredit Latvian emigres, particularly those who actively sought the end of the Soviet occupation. This was accomplished by publication of books and articles purporting to describe the war crimes and collaboration of which emigres were guilty. The facts were often embellished and supplemented with forged documents, false testimony and pure invention. When he was assigned to a post in the United States, Lesinskis' job was to obtain information about Latvian communities abroad, to promote discord within them and to discedit their leaders. All of this was a KGB function.

Id. at 1124. The court concluded that

> We are faced with a situation where the Soviet Union has a continuing, strong state interest in a finding that defendant was guilty of atrocious conduct while collaborating with German occupation forces. We also are faced with the fact that the Soviet Union uses special procedures in political cases such as this which, on occasion at least, resul. in false or distorted evidence in order to achieve the result which the state interest requires.

Id. at 1126.

In *Kungys* the district court found the government's evidence not credible and denied the government's petition to revoke Kungys's citizenship. The court rebuked the government for its use of Soviet supplied evidence:

> The government elected to collaborate in the prosecution of this case with the Soviet Union, a totalitarian state. It has accepted the assistance of Soviet authorities, particularly the testimony of witnesses who had been interrogated by Soviet investigators and from whom statements had been obtained by those interrogators.
>
> Knowing the nature of the Soviet legal system, the government had an obligation to make every effort to ensure that the testimony it received under the auspices of the Soviet authorities was not tainted by the known Soviet practices designed to obtain the desired results in a particular case even at the expense of the truth. If the governmen. deputizes a totalitarian state to obtain for it evidence to be used in a United States court, the government must take whatever steps are necessary to ensure that the evidence was not coerced or otherwise tainted by improper pressures.

Id. at 1131-32. *See also United States v. Sprogis*, 763 F.2d 115, 120-21 (2d Cir. 1985); *Laipenieks v. I.N.S.*, 750 F.2d 1427, 1435-36 (9th Cir. 1985).

Congruent with the Supreme Court's teaching in *Washington*, I conclude that a significant deprivation of due process occurred because the Soviet authorities controlled both the witnesses supplied to the government and Kowalchuk's access to any possible exculpatory information.

C.

The majority rely upon *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), to support its summary dismissal of Kowalchuk's due process argument. That case is easily distinguished. In *Valenzuela-Bernal*, the defendant drove a car with five

illegal aliens through a border patrol check-point. The defendant and three passengers were apprehended, but two of the passengers were deported after they identified the defendant as the driver of the car and admitted they were illegally in the country. One passenger, Romero-Morales, was detained as a witness. Subsequently, the defendant was charged with, and convicted of, transporting an illegal alien, namely Romero-Morales.

The defendant argued that deportation of the other passengers had violated his sixth amendment right because "the deportation had deprived him of the opportunity to interview the two remaining passengers to determine whether they could aid in his defense." *Id.* at 861. The Court found this argument invalid absent some showing of materiality: "Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." *Id.* at 873.

For Kowalchuk the deprivation of due process goes far beyond the scope of that suffered in *Valenzuela-Bernal*. The *Valenzuela-Bernal* Court noted:

> [R]espondent was present throughout the commission of this crime. No one knows better than he what the deported witnesses actually said to him, or in his presence, that might bear upon whether he knew that Romero-Morales was an illegal alien who had entered the country within the past three years. . . . Romero Morales, of course, remained fully available for examination by the defendant and his attorney.

Id. at 871. Kowalchuk's attorney was not only denied convenient access to witnesses, he was essentially denied the ability to present any defense at all. Unlike Valenzuela-Bernal, Kowalchuk was denied access to the location of the alleged disqualifying acts themselves, Lubomyl, to refute the testimony of hostile witnesses based on the physical location of the events. Although Kowalchuk was denied completely the ability to obtain, interview, or even seek favorable witnesses, Valenzuela-Bernal was merely denied convenient access to two known witnesses. Finally, Kowalchuk had to defend himself while looking across a 40 year gulf of time, a factor not present in *Valenzuela-Bernal*. The deprivation suffered by Kowalchuk, therefore, far exceeds that of *Valenzuela-Bernal*, and makes that case inapposite.

The district court's treatment of Kowalchuk's due process claim was totally inadequate. The district court ignored Kowalchuk's right to investigate and obtain witnesses, compensating by discarding the testimony of those Soviet witnesses produced by the government who did testify:

> For the most part, therefore, the factual conclusions which follow are based upon the testimony of the defendant and his witnesses, or other evidence not inconsistent with that testimony.

571 F. Supp. 72, 80. Purportedly ignoring the Soviet witnesses in no way corrects Kowalchuk's inability to present a defense. The essential inquiry is whether Kowalchuk had an ample and fair opportunity to seek, interview and present favorable evidence. The undeniable response to this inquiry is that he did not.

It is no answer to say that the government was also restricted in its ability to obtain evidence other than that spoon fed to it by the Soviet authorities. I have the

of 1948, P.L. No. 774, 62 Stat. 1009 (1948), in that he strong feeling that had the United States been given the opportunity to thoroughly investigate this case, it might well have decided not to prosecute. As it was, the government's case is based on evidence produced by the KGB to effectuate its political ends. Congruence between that purpose and individual justice has yet to be established. The net result is that the prosecution is in the uncomfortable position of arguing allegations which it has not had the opportunity to verify and which it, in all good conscience, must view as suspect.

I now turn to Kowalchuk's statutory contentions.

V.

Denaturalization proceedings operate with two competing interests at stake. On the one hand, a certificate of citizenship is "an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured." *Johannessen v. United States*, 225 U.S. 227, 238 (1923). On the other hand, because American citizenship once obtained is an inestimable right, the government must meet one of the highest burdens of proof in modern jurisprudence: to set aside a grant of citizenship the government's evidence must be clear, unequivocal and convincing and not leave the issue in doubt. *Fedorenko v. United States*, 449 U.S. 490, 505 (1981). Our standard of review of the historical or narrative facts, either basic or inferred (or sometimes called "subsidiary facts") is the familiar clearly erroneous rule. *Krasnov v. Dinan*, 405 F.2d 1298, 1302-03 (3d Cir. 1972).

Yet basic and inferred facts "must be distinguished from a concept described in a term of art as an 'ultimate fact.'" *Universal Minerals Inc. v. C. A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981). An ultimate fact is a determination made by a trial court upon which liability turns. It may either be "a

conclusion of law or at least a determination of a mixed question of law and fact." *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937); *see also Pullman-Standard v. Swint*, 456 U.S. 273, 286 n.16 (1982). The factual components of the "ultimate fact" are subject to review under the clearly erroneous rule. *Pullman-Standard v. Swint*, 456 U.S. at 286-87 n.16; *Cuyler v. Sullivan*, 446 U.S. 334, 342 (1980); *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972). The legal components of the "ultimate fact," however, are subject to plenary review for legal error. *Pullman-Standard v. Swint*, 456 U.S. at 286 n.16; *Cuyler v. Sullivan*, 446 U.S. at 341-42.

VI.

The government sued to have appellant denaturalized under 8 U.S.C. § 1451(a). This statute provides that a grant of citizenship may be revoked if it was "illegally procured or . . . procured by concealment of a material fact . . . ." For a grant of citizenship to be procured legally, the applicant must have been in the country for at least five years after being lawfully admitted pursuant to a valid visa. 8 U.S.C. §§ 1181(a), 1427(a)(1). Appellant entered the United States under a visa issued pursuant to the Displaced Persons Act of 1948 (DPA), Pub. L. No. 774, 62 Stat. 1009 (1948), which was enacted by Congress to ease the then existing quota structure and allow for increased immigration of World War II displaced persons into the United States. If, therefore, a person either was not eligible for refugee or displaced person status under the DPA or made a material misrepresentation on his visa application, he could be denaturalized under § 1451(a). *See Fedorenko v. United States*, 449 U.S. 490 (1981).

The DPA provided:

> (b) "Displaced person" means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization [IRO].

DPA § 2(b), 62 Stat. at 1009. Part II of the IRO Constitution defined persons who are not the concern of the organization:

> *Persons who will not be the concern of the Organization.*
>
> 1. War criminals, quislings and traitors.
>
> 2. Any other persons who can be shown:
>
> (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
>
> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.[1]
>
> 1 Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation, shall not be considered to constitute "voluntary assistance." Nor shall acts of general humanity, such as care of wounded or dying, be so considered except in cases where help of this nature given to enemy nationals could equally well have been given to Allied nationals and was purposely withheld from them.
>
> [Footnote in the original.]

Constitution of International Refugee Organization, Annex I, Part II, *opened for signature* Dec. 15, 1946, 62 Stat. 3037, 3051-52, T.I.A.S. No. 1846 (footnote omitted). The DPA also provided that: "Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." DPA § 10, 62 Stat. at 1013.

VII.

In our review, we must determine, as a matter of law, whether the government proved its case with clear, unequivocal and convincing evidence that did not leave the issue in doubt in regard to three issues: that Kowalchuk voluntarily assisted the enemy forces in their military operations; or assisted the enemy in persecuting civil populations; or made a willful misrepresentation in obtaining a visa.[7]

A.

I consider first the district court's determination that appellant violated § 2(b) of Part II of the IRO Constitution in that he "voluntarily assisted the enemy forces." This is an ultimate finding, and is a mixed question of law and fact. I conclude that the narrative facts, upon which the legal conclusion rests, are supported by sufficient evidence in the record so that they are not clearly erroneous. *See Krasnov v. Dinan*,

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7. The government asserts that § 13 of the DPA provides an independent ground for ineligibility of a visa in this case. Section 13 forbids issuance of a DPA visa to "any person who . . . has been a member of . . . any movement which is or has been hostile to the United States . . . ." Because the district court made no finding that the Ukrainian schutzmannschaft was a "movement . . . hostile to the United States," I find the government's position unsupported by the record.

465 F.2d at 1302-03. No party disputes that appellant did work for the Lubomyl militia and that this organization was a component of the Nazi-sanctioned local government. Further, I can draw the permissible inference that the militia provided at least some level of assistance to the enemy. But, to prove a violation of the statute and allow for denaturalization, the government had to meet its burden of proving that appellant's visa was illegal, or that appellant *voluntarily* assisted the enemy.

The district court found that "[i]t is not at all clear that, in 1949, membership in or employment by the schutzmannschaft at Lubomyl would have precluded the issuance of a visa," but somehow concluded that the government had nevertheless proved, with adequate certainty, that Kowalchuk's conduct constituted voluntary assistance. 571 F. Supp. at 82. The majority attempt an end run around this finding of fact. The majority somehow fashion an administrative presumption which operates to minimize drastically the government's heavy burden of proof -- a burden established Supreme Court decisions, a burden that cannot be diminished by any administrative manual. Moreover, the majority's reliance is an intellectual frolic of their own, not shared by the district court here.

The majority assert that "[t]he provisions of the IRO constitution, and the testimony of Thomas, Conan, and Hilberg support the district court's findings and convincingly demonstrate that the defendant's voluntary membership in the Ukrainian schutzmannschaft constituted voluntary assistance to the enemy." Typescript at 14. As support for their position that membership in the Ukrainian militia would have led to either a presumption of voluntary assistance, or constituted grounds for *per se* ineligibility for a visa, the majority rely upon paragraphs 22 and 27 of Chapter VI of the *IRO Manual*

for Eligibility Officers as placing the burden upon an applicant who is shown to have been a member of a local police force to "disprove the voluntary nature of his enlistment." *Id.* n.7. By relying on this presumption, the majority permit the government to sidestep its heavy burden of proving voluntary assistance by clear and convincing evidence. No authority sanctions such glib reallocation of Supreme Court-imposed burdens of proof.

I am forced to emphasize that denaturalization procedures are akin to criminal procedures; the clear, unequivocal and convincing evidence burden "'is substantially identical with that required in criminal cases -- proof beyond a reasonable doubt.'" *United States v. Riela*, 337 F.2d 986, 988 (3d Cir. 1964)(quoting *Klapprott v. United States*, 335 U.S. 601, 612 (1949)). In other criminal contexts, the Supreme Court has determined that use of a presumption by the government violates due process. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court held that use of a presumption to place upon the defendant the burden of disproving an essential element of the crime violated due process. *See also Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *Patterson v. New York*, 432 U.S. 197, 215-16 (1977). The implications for this appeal thus are unavoidable. In arriving at a contrary conclusion in this membership *per se* issue, the district court correctly ignored the presumption upon which the majority ground their case.[8]

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8. Furthermore, it is not at all clear from the evidence that the presumption spawned from the manual was actually in use at the time of Kowalchuk's visa application. The majority assert that the testimony of witnesses Thomas, Conan, and Hilberg "convincingly demonstrate that the defendant's voluntary membership in the schutzmannschaft constituted voluntary

B.

Moreover, the IRO Constitution and the IRO manual are ambiguous with regard to whether Kowalchuk would have been considered to have voluntarily assisted the enemy based simply on his membership in the schutzmannschaft. The statutory language relating to § 2(b) of the IRO Constitution,

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assistance to the enemy." Typescript at 14. But only Conan's testimony indicated clearly that the applicant would have the burden of proving involuntariness. App. at 1512. Moreover, witness Conan, was an official with the Displaced Persons Commission for the British Zone of Germany, *id.* at 1509, and did not function in the United States occupied region of Austria where Kowalchuk's visa application was processed. *Id.* at 13, 586. His testimony cannot be as persuasive as that of other officials who testified on this issue.

Michael Thomas, who authored the IRO manual, was not as definite as Conan on whether membership in the schutzmannschaft shifted the burden of proof to an applicant to establish his lack of voluntariness. Although he initially so stated in his deposition, *id.* at 398, upon cross-examination he stated that membership in a group such as the schutzmanschaft would only have alerted him to look for more facts. *Id.* at 431-32, 442-47. Thomas also stated that IRO certification practices, even after publication of the IRO manual, could vary from district to district. *Id.* at 425.

George Warren and John Chapin processed visa applications in the United States zone of Austria, during the time when Kowalchuk's application was processed there. *Id.* at 572-75, 1024-25. Warren actually signed Kowalchuk's certification of eligibility. *Id.* at 586. Both of these witnesses testified that membership in an organization such as the schutzmannschaft would only have caused suspicion and further investigation. *Id.* at 588, 602, 1050. Therefore, the weight of the evidence tends to show that membership in or employment by the schutzmannschaft alone would not have constituted "voluntary assistance to the enemy." The district court's factual conclusion that "[i]t is not at all clear that, in 1949, membership in the schutzmannschaft at Lubomyl would have precluded the issuance of a visa," 571 F. Supp. at 82, is therefore not clearly erroneous.

incorporated into the DPA, defined what constituted "to have voluntarily assisted the enemy forces," by a specific explanatory footnote:

> [1] Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation, shall not be considered to constitute "voluntary assistance." Nor shall acts of general humanity, such as care of wounded or dying, be so considered except in cases where help of this nature given to enemy nationals could equally well have been given to Allied nationals purposely withheld from them.

IRO Constitution, 62 Stat. at 3052. Whether "continuance of normal and peaceful duties" refers to continued employment of individuals in positions with normal and peaceful duties, or performance of duties that continued to be normal and peaceful, is not clear. Therefore, given its burden of proof, the government failed to prove that this phrase would not exonerate Serge Kowalchuk, whose duties with the schutzmannschaft by self admission did not commence until after the German occupation. Indeed, the government has ignored this explanatory footnote in its entirety. Michael Thomas, upon whose testimony the majority rely in this matter, testified that if the normal and peaceful function of a police force continued after occupation, the date of an individual's joining the force would not be critical in evaluating his eligibility for a visa under the constitution. App. at 429. Professor Hilberg also testified that local police forces sometimes were integrated into the schutzmannschaft, and that their normal duties might continue. *Id.* at 933-35, 943-44. Keeping in mind that

in a denaturalization case, "the facts and the law should be construed as far as reasonably possible in favor of the citizen." *United States v. Anastasio*, 226 F.2d 912, 917 (3d Cir. 1955)(footnotes omitted), *cert. denied*, 351 U.S. 931 (1956). I conclude that the government did not prove by clear and convincing evidence that Kowalchuk did not qualify for a visa under § 2(b) note 1, of the IRO Constitution.

C.

According to the IRO Constitution, appellant's duties may not have constituted voluntary assistance, absent some showing of an element of intent-to-aid, or "specific purpose of aiding the enemy," neither of which was proven by the government. The language difference between § 2(a) and § 2(b) of the IRO Constitution, and the language in the IRO manual supports this intent requirement. Section 2(a) of the IRO Constitution disqualifies persons who can be shown "(a) to have assisted the enemy in persecuting civil populations. . . ." Section 2(b) speaks of persons who can be shown "(b) to have *voluntarily* assisted the enemy forces." (Emphasis supplied).

In *Fedorenko v. United States*, 449 U.S. 490 (1981), the Supreme Court ruled that the language difference between these two sections -- the presence of "voluntarily" in § 2(b) and its absence in § 2(a) -- produces a fundamental distinction in the burden of proof. In *Fedorenko* the Court ruled that under § 2(a) it was not necessary for the government to prove that the defendant *voluntarily* assisted the enemy in persecuting civilian populations, clearly implying that the government had to do so in making out a case under § 2(b): "That Congress was perfectly capable of adopting a "voluntariness" limitation where it felt that one was necessary is plain from comparing § 2(a) with § 2(b) . . . ." *Id.* at 512.

Moreover, the definition of voluntariness contained in the explanatory footnote and the IRO manual establish an intent requirement. The footnote states that "[m]ere continuance of normal and peaceful duties, *not performed with the specific purpose of aiding the enemy* . . . shall not be considered to constitute 'voluntary assistance.'" IRO Constitution, 62 Stat. at 3052 n.1 (emphasis supplied). The IRO manual in paragraph 23 of Chapter VI clearly stipulates an intent requirement: "Such assistance to the enemy . . . must have been voluntary, and given deliberately and of their own free will by the persons concerned, with the specific purpose of aiding the enemy in their military operations against the Allies." Govt. App. at 51. Therefore, as to § 2(b), the government must prove intent to assist. Proof of mere membership in the militia is insufficient. Because the government produced absolutely no other proof of intent to assist at trial, I find that it did not meet its heavy burden of proving voluntariness.

VIII.

I now turn to the district court's conclusion that under § 2(a) appellant "assisted the enemy in persecuting civil populations." This conclusion is an ultimate finding and therefore merits the same analysis applied to the issue of voluntary assistance to the enemy. The difference between the § 2(a) and § 2(b) issue is that the government has a lesser burden in regard to § 2(a). The government need not prove, under § 2(a), that Kowalchuk voluntarily persecuted civil populations. As with § 2(b) the question of whether the basic facts prove the requisite assistance in persecuting civilian populations is one that implicates a legal component. Again, the issue is whether the government met its high burden of proof, proving by

clear and convincing evidence that Kowalchuk persecuted the civilian population.

A.

Appellant argues that he performed only clerical duties for the militia and that he, personally, was not involved actively in any persecutions. At this point, we must emphasize the findings of the district court as to basic and inferred facts. Specifically, the district court found that "defendant was responsible for the distribution of food and other supplies to persons entitled to receive the same by virtue of their employment as part of the local government . . . ." *Kowalchuk*, 571 F. Supp. at 80. The court also found that "defendant did occupy a position of some responsibility with the schutzmannschaft. He had his own office there . . .; he typed up and issued duty rosters; he typed the daily reports of police activity, etc. He probably wore a police uniform of some kind, during at least some of his duty hours at the police station." *Id.* at 81. Finally, the court noted "that the evidence is plainly insufficient to constitute clear and convincing proof of defendant's involvment in the massacre [of Lubomyl's Jewish population]." *Id.* These factual findings are not clearly erroneous. *See Krasnov v. Dinan*, 465 F.2d at 1302.

Significantly, the district court made no findings that appellant participated in any substantive decisions in either his food distribution or clerical position. Although Kowalchuk did distribute food, the evidence did not indicate that he decided to whom such distribution would be made. Although he admittedly typed the duty rosters, which included assigning patrols within the Jewish ghetto, the government did not prove that he decided who should go on these patrols, when they should occur, or even

that they should occur at all. *See* Transcript of original panel oral argument at 42. Although Kowalchuk's position in the local militia was "of some responsibility," the responsibility was simply that of a clerk and not that of a decisionmaker. The government argues that this participation alone is sufficient to prove, by the requisite degree of certainty, that appellant was involved in persecuting the civilian population under § 2(a).

No reported case has yet held such a minimal level of involvement to be sufficient assistance in persecution of civilian populations to constitute grounds for denaturalization. The leading Supreme Court case is *Fedorenko v. United States*, 449 U.S. 490 (1981). In *Fedorenko*, the Court found that a person could be denaturalized where he failed to disclose on his visa application that he had been an armed guard at a Nazi concentration camp. The Court concluded, as a matter of law, that being an armed concentration camp guard constituted sufficient assistance in the persecution of civilians, that, had it been known at the time, would have precluded the issuance of a visa. 449 U.S. at 512-13. By way of comparison, the Court speculated that "an individual who did no more than cut the hair of female [Jewish] inmates before they were executed [by the Nazis]" would not have been found to have assisted in the persecution of civilians. 449 U.S. at 512 n.34. In *United States v. Dercacz*, 530 F. Supp. 1348 (E.D.N.Y. 1982), sufficient evidence of assistance in persecution was found where the defendant was a uniformed Ukrainian militiaman who actually went on patrols and rounded up local Jews who violated restrictions. Finally, in *United States v. Osidach*, 513 F. Supp. 51 (E.D. Pa. 1981), denaturalization was ordered upon proof that defendant was in the local militia, working

as *both* a patrol officer and a clerk/interpreter.

The Court of Appeals of the Second Circuit recently held in a case similar to that before us, that a naturalized citizen who had served as an assistant police precinct chief in a Latvian town during the Nazi occupation had not assisted in the persecution of Jews or other civilians. *United States v. Sprogis*, 763 F.2d 115 (2d Cir. 1985). The court summarized the individual's activity:

> It is true that Sprogis paid certain farmers who had already transported the [Jewish] prisoners to the police station and that he signed documents reflecting those payments. Sprogis also signed papers recording the disposition which the police had made of the prisoners' property. Finally, he was present at the police station during the detention of the prisoners and he allowed their incarceration to continue. However, these were not acts of oppression. They do not amount to the kind of active assistance in persecution which the DPA condemns.

Id. at 122. Also, in *Laipenieks v. I.N.S.*, 750 F.2d 1427, 1437 (9th Cir. 1985), the behavior of a member of the Latvian Political Police, who assisted Nazis in investigating communists and "occasionally struck prisoners," did not constitute political persecution on the basis of political opinion under 8 U.S.C. § 1251(a)(19).

Osidach, therefore, represents the lowest level of activity that a federal court has found sufficient to constitute assistance in the persecution of civilian populations. I do not believe that appellant's conduct herein approaches that level of involvement. I believe it more analogous to that of the police officer in *Sprogis*.

B.

The horrors of tyranny inflicted upon civil populations in territories controlled by occupying Nazi forces during World War II are so notorious that no citation is necessary. News accounts, official histories, and thousands of articles, dramas, novels, motion pictures, and television documentaries bear witness to this universal tragedy. Although the holocaust suffered by six million Jews is the apogee of Nazi degeneracy, the Nazis did not limit their ruthless murders, tortures, and terror to members of one particular religious faith. It is a matter of record that 20 million Soviet citizens -- civilian and military -- perished by the sword of the Third Reich. To a lesser numerical extent, Polish, French, Belgian, Danish and Italian civilians were slaughtered by random firing squads as punishment for violating rules of occupying armies.

Atrocities carried out by the Nazis against the general populations of occupied countries are further evidenced in a contemporaneous Czechoslovakian account:

> The German terror . . . expressed itself immediately . . . . From the first day [of occupation] mass arrests began among all classes of Czech society . . . . And so in the course of not quite two months some 12.000 Czechs found themselves in prison, to remain there for short or long terms; there were among them politicians, journalists, teachers and professors . . . . The persecution was, however, directed with special emphasis against the supporters of [the pre-occupation government], against judges, Social Democratic politicians and members of factory committees, and finally against officers of the former Czechoslovak army . . . .

Czechoslovak Ministry of Foreign Affairs, *Two Years of German Oppression in Czechoslovakia* 48 (Unwin Brothers Ltd., Great Britain 1941).

To facilitate their abilities to persecute local populations, the Nazis took special interest in the local police departments. The Nazis would oversee all police activities, maintaining more direct involvement in selected police functions, "especially in the sphere of the secret state police and the criminal police . . . while internal security and public order . . . [would be left] in principal to be maintained by the . . . [local] police . . . ." *Id.* at 32-33. As Nazi occupation continued, their control over the subject areas tightened and the suffering of local populations grew. Additional pressures were applied through the local police and, if the police resisted Nazi directives, pressure was applied directly on them. The Czech experience is, again, instructive. There, "[t]he German ferocity . . . cruelly affected the leading officials of the Czech police. As they would not lend themselves to the persecution of their fellow-citizens and would not help in the barbarous treatment of the prisoners, they were themselves arrested and treated with incredible cruelty." *Id.* at 50.

The situation was even worse in the Ukraine than in other occupied areas. Nazi occupation there was particularly exploitive because the Ukraine figured in a long-term, large-scale German colonization scheme. I. Kamenetsky, *Hitler's Occupation of Ukraine (1941-1944)* 35-38 (Marquette University Press, Wisconsin 1956). While this colonization plan, or *Lebensraum*, was pursued throughout Eastern Europe it was applied with particular zeal in the Ukraine where the Nazis

> regarded all slavs as racially inferior, in fact subhuman, and intended to achieve German

> objectives not by sophisticated tactics, but by sheer brute force . . . . During the period of German occupation, Ukraine thus became a wretched laboratory . . . -- [with such experiments as] the mass extermination of the Jews, [and] the deportation and brutalization of Ukrainians -- and the German colonization with its inherent feature of enslavement of the inhabitants and the exploitation of the country's resources. Ukraine suffered probably more than any other country . . . .

Dmytro Doroshenko. *A Survey of Ukrainian History* 745 (Humeniuk Publication Foundation, Winnipeg 1975). Once the Nazis achieved control in the Ukraine they "launched a dual policy of annihilation of the politically and ethnically undesirable elements and the enslavement of the remainder." *Id.* at 748. As a result of their merciless techniques in pursuit of their goals of domination, "hundreds of thousands of Jews and Ukrainians . . . were coldly and systematically butchered by the Nazis because they did not fit into Hitler's 'new order.'" *Id.*

C.

Under this type of relentless pressure, and with the alternatives of arrest, torture, imprisonment, and death staring them in the face, it is hardly surprising that many inhabitants of occupied countries were passively accommodating to the Nazis. Many of these undoubtedly were government workers and civil servants who continued in or assumed government positions under Nazi occupation. Under these circumstances, if this large number of Europeans performed government or other service under Nazi occupation, no reasonable person would conclude that

each of them "assisted in the persecution of civil populations" and would, thereby, be forever denied even the possibility of American citizenship. Can we say that the baker who delivered bread to the Lubomyl militia was guilty of assisting in Nazi persecutions? Or the char woman or janitor who cleaned the office where Kowalchuk toiled as a clerk? A line must be drawn. Although to do so is a very difficult, if not ultimately arbitrary, act, we are required to do so in this case whether we affirm or reverse the district court.

I believe that we should not extend the *Fedorenko-Dercacz-Osidach* line of cases to the facts presently before us. Further, consistent with Supreme Court doctrine, I am required by our own decision in *Anastasio* to resolve all doubts in favor of the citizen. Measured against this standard, I conclude that the government did not meet its high burden of proof on this issue either.

IX.

This brings me to the final question of whether appellant's false statements about his residence and occupation during the war were misrepresentations of material facts sufficient to have denied him a visa under the DPA.

In bringing this action the government charged only misrepresentations by Kowalchuk concerning his military membership and his residence in Lubomyl. The district court, agreeing with at least some of the government's arguments, revoked Kowalchuk's citizenship on three grounds: (1) that as a member of the Lubomyl militia he voluntarily assisted the enemy; (2) that as a member of the Lubomyl militia he assisted the Nazis in persecuting civilian populations; and (3) that he made a willful, material misrepresentation of

fact by lying about his wartime residence and employment.[9]

A.

Section 10 of the DPA provides in relevant part:

> Any person who shall willfully make a misrepresentation for the purpose of gaining

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9. With respect to the misrepresentations, the majority decide to go much further than the district court. The majority state that appellant made five material misrepresentations concerning: his employment in the Lubomyl militia: his wartime residence in Lubomyl: his special schooling at German expense: his voluntary departure from Lubomyl with the German forces: and his membership in the Lubomyl militia. Typescript at 8-9. Because the majority fail to explain the difference between membership and employment in the Lubomyl militia, and because I see no difference of significance between the two contentions, I will proceed as though these were substantively the same misrepresentation.

As noted above, of these asserted misrepresentations, the district court expressly addressed only those concerning appellant's "residence in Lubomyl and his employment by the town government there during the German occupation." *Kowalchuk*, 571 F. Supp. at 81. Not surprisingly, the district court did not discuss appellant's special schooling or his departure from Lubomyl with the German army as material misrepresentations. First, the court did not find that appellant's leaving Lubomyl with the German army constituted voluntary departure with them. *See supra*, n. 1. The government does not assert that such a finding was error. Second, as to the special schooling issue, the government argued at trial, not that appellant's failure to disclose it was a material misrepresentation, but that it was "a complete fabrication," designed to provide appellant with an alibi for the time when the Nazis liquidated the Lubomyl ghetto. *Kowalchuk*, 571 F. Supp. at 76. Only the majority, not the government, asserts either of these two alleged misrepresentations as a basis for affirming the district court's order of denaturalization. Therefore, because the factual predicate for one was not found by the fact finder, because the other runs counter to the government's case in chief at trial, and because the government has not asserted either as an alternative rationale for affirming the district court, I choose not to address either here.

> admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States.

62 Stat. 1013. In the development of case law, § 10 no longer can be considered in and of itself. At least since *Chaunt v. United States*, 364 U.S. 350 (1960), and especially since *Fedorenko v. United States*, 449 U.S. 490 (1981), this provision of the DPA must be analyzed in conjunction with § 2, which in turn incorporates §§ 2(a) and (b) of the IRO constitution. The Supreme Court has yet to decide whether the material facts test applied in naturalization applications also applies in visa applications. "[W]e find it unnecessary to resolve the question [of] whether *Chaunt's* materiality test also governs false statements in visa applications." *Fedorenko*, 449 U.S. at 509. However, in naturalization proceedings the Court has stated that, to prove misrepresentation or concealment of a material fact, the Government must prove by clear and convincing evidence:

> either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

Chaunt v. United States, 364 U.S. 350, 355 (1960). The first prong deals with cases where denial of citizenship could have been premised on the undisclosed information itself. The second prong deals with cases where the undisclosed information would not, in and of itself, justify denial of citizenship but where, had it been known, other facts could have been discovered justifying a denial of citizenship.

The government and I part company on our evaluation of both prongs. From my discussion of IRC

§ 2(a) "assisted the enemy in persecuting civil populations," and IRO § 2(b) "voluntarily assisted the enemy forces," in Parts VII. and VIII., *supra*. I conclude that the government did not satisfy the first prong of *Chaunt*. An analysis of the second prong, which the majority does not meet, is more difficult.

B.

What has divided the courts of appeals in visa application cases is not the applicability of *Chaunt*, but rather the import of the second prong of *Chaunt*'s denaturalization test. Some courts have held that, in visa cases, the government need only prove that, had the misrepresentation not been made, an investigation would have been conducted that *might* have uncovered facts warranting denial of a visa.[10] Other courts, including this one, require more. We require the government to prove not only that, had the correct information been available, an investigation would have been undertaken but that it *would* have uncovered facts warranting visa denial. *United States v. Riela*, 337 F.2d 986, 989 (3d Cir. 1964). *See also United States v. Sheshtawy*, 714 F.2d 1038, 1040-41 (10th Cir. 1983); *La Madrid-Peraza v. I.N.S.*, 492 F.2d 1297, 1298 (9th Cir. 1974); *United States v. Rossi*, 299 F.2d 650, 652-53 (9th Cir. 1962).

I believe that the most well-reasoned explication of the second prong of *Chaunt* is found in *United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir. 1983), which is the only court of appeals that has made an intelligent effort to discuss the consequences of adopting a literal meaning of the term "might" in *Chaunt*. The other

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10. *United States v. Kozly*, 728 F.2d 1314, 1319-20 (11th Cir.), *cert. denied*, 105 S.Ct. 130 (1984); *United States v. Fedorenko*, 597 F.2d 946, 951 (5th Cir. 1979); *Kassab v. I.N.S.*, 364 F.2d 806, 807 (6th Cir. 1966); *United States v. Oddo*, 314 F.2d 115, 118 (2d Cir.), *cert. denied*, 375 U.S. 833 (1963).

cases do not contain such a "reasoned elaboration" for liberally construing the meaning of the term "might." *See United States v. Kozly*, 728 F.2d at 1320. *Kassab v. I.N.S.*, 364 F.2d at 807. *United States v. Oddo*, 314 F.2d at 118. The only case to provide any reasoned elaboration for holding that "might" should be read literally, relies simplistically on the reasoning that to hold otherwise would require the government to conduct an extensive investigation and would encourage an "applicant with something to hide" to lie to the I.N.S. *United States v. Fedorenko*, 597 F.2d at 951. The *Fedorenko* court, however, did not mention the alternative considerations, as did the court in *Sheshtawy*. After considering all implications, the *Sheshtawy* court concluded: "We believe that the *Chaunt* Court considered this tension and, in effect, concluded that even though there may be some who are encouraged to lie, the importance of putting naturalized citizenship well beyond the danger of unwarranted revocation justifies the adoption of so severe a test." *Sheshtawy*, 714 F.2d at 1041.

The issue comes down to this: If this court, or any court, including the Supreme Court, adopts the literal meaning of one word "might," as contained in *Chaunt*, then one word will wipe out an entire galaxy of settled case law. Applied literally, all the second prong of *Chaunt* would appear to require the government to prove is that, had the truth been told, it "might have been useful" in a subsequent investigation and that investigation might "possibly lead[] to the discovery" of disqualifying facts. Thus read, *Chaunt* would undermine cases from *Schneiderman v. United States*, 320 U.S. 118 (1943), to *Fedorenko v. United States*, 449 U.S. 490 (1981), which establish that citizenship, once granted, is a precious right; that, in a denaturalization proceeding, the government bears a heavy burden; that it must prove its case by clear,

unequivocal, and convincing evidence, so as not to leave the issue unclear; and that, in such cases, all doubt is to be resolved in favor of the defendant.

Chaunt must be construed beyond the literal meaning of its language. The only significant Supreme Court explication is found in Justice Blackmun's concurrence in *Fedorenko*, which the Tenth Circuit relied upon in *Sheshtawy*. There, Justice Blackmun recognized the tension between the "Government's commitment to supervising the citizenship process and the naturalized citizen's interest in preserving his status." *Fedorenko*, 449 U.S. at 522 (Blackmun, J., concurring). He noted that when "the Government seeks to revoke [a grant of citizenship], the Court consistently and forcefully has held that it may do so only on scrupulously clear justification and proof." *Id.* at 523. In addressing the second prong of *Chaunt*, Justice Blackmun concluded that it "indeed contemplated only this rigorous standard . . .," *id.*, and that under this prong the government "must prove the existence of disqualifying facts, not simply facts that *might* lead to hypothesized disqualifying facts." *Id.* at 524. Justice Blackmun ended by stating: "If naturalization can be revoked years or decades after it is conferred, on the mere suspicion that certain undisclosed facts *might* have warranted exclusion, I fear that the valued rights of citizenship are in danger of erosion." *Id.* at 525-26.

I believe that Justice Blackmun's analysis is correct. To be consistent with the Supreme Court's prior and subsequent decisions, the second prong of *Chaunt* must be read as requiring proof, by clear, unequivocal and convincing evidence, of the existence of actual disqualifying facts. Thus, the government must prove that, had the undisclosed facts been known, an investigation would have been conducted and disqualifying facts would have been discovered.

C.

By the district court's own determinations and our discussion in Parts VII. and VIII., *supra*, the government clearly did not meet its burden under the first prong of the *Chaunt* test. The district court determined that the government had not proved facts, which if known, would have warranted denial of Kowalchuk's visa. The district court declared that "[i]t is not at all clear that, in 1949, membership in . . . [the militia] at Lubomyl would have precluded the issuance of a visa." *Kowalchuk*, 571 F. Supp. at 82.

With the first prong of the test eliminated, I turn to the second: if the facts had been disclosed would they have led to an investigation warranting denial? I have concluded that the government failed to prove that appellant's wartime activities constituted either voluntary assistance to the enemy or assistance in the persecution of civilian populations. No additional reliable evidence conclusively indicated that had the misrepresentations not been made appellant's visa application would have been rejected, at most, it indicates that it would have caused further investigation. Therefore, I would hold, as a matter of law, that the government has failed to prove by the requisite clear and convincing evidence that, had appellant divulged his actual wartime residence and occupation on his visa application, an investigation would have uncovered facts that would have resulted in the denial of the visa. Bound as I am by this court's precedent, not rejected by the Supreme Court in *Fedorenko*, I do not meet the question of what such an investigation *might* have uncovered.

X.

Accordingly, I would reverse the district court's judgment on two separate grounds: (1) the court erred in concluding that the government met its burden in

proving the violations of the Displaced Persons Act of 1948 as charged, and (2) the appellant was deprived rights guaranteed by the due process clause. I would reverse and remand these proceedings with a direction that judgment be entered in favor of the appellant.

HUNTER, *Circuit Judge*, with whom Judge Mansmann joins, dissenting:

1. I believe that the government did not meet its burden in this case. Accordingly, I concur in Chief Judge Aldisert's dissent and would reverse and remand with direction to enter judgment for appellant.

2. I join the Chief Judge's discussion in Parts V through IX which, in our view, clearly and fully disposes of the case. Therefore, I would not reach the due process grounds.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED SEPTEMBER 11, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1571

UNITED STATES OF AMERICA

vs.

KOWALCHUK, SERGE, a/k/a KOWALCZUK, SERHIJ

Serge Kowalchuk,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 77-118)

Argued April 23, 1984

Before: ALDISERT, *Chief Judge,* WEIS, and ROSENN, *Circuit Judges.*

(Filed Sep 11, 1984)

Appendix B

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OPINION OF THE COURT

ALDISERT, *Chief Judge.*

This appeal requires us to decide whether appellant Serge Kowalchuk was properly denaturalized in the proceeding below. In making this determination we must examine, under the

appropriate standards of review, certain findings of fact and conclusions of law made by the district court. Because we conclude that the government failed to prove its charges against appellant by the requisite degree of certainty, we reverse.

I.

Appellant was born in Kremianec in the Ukraine in 1920, and later moved to Lubomyl, also in the Ukraine. Shortly after the invasion of Russia in 1941, the Nazis overran Lubomyl and took control of the local government. During the period of Nazi occupation, appellant worked as a clerk for the Lubomyl police (also known as the *schutzmannschaft* or militia) and did food distribution work. As a police clerk he occasionally wore a uniform, was aware of the restrictions placed on Lubomyl Jewish residents, and prepared duty rosters for the other militia men which included assigning them to patrol the Lubomyl Jewish ghetto. As in other areas under Nazi occupation, the Jews in Lubomyl were persecuted, abused, degraded and eventually killed. During the time in which the Jewish population in Lubomyl was exterminated, however, appellant was receiving special training at a school away from the town at German expense. Further, there was no evidence that appellant performed any militia patrol duties himself or that he was otherwise engaged directly in persecuting the Jewish people.

The dissent, in its rendition of the facts, attempts to paint a much harsher picture both of the Lubomyl militia in general and appellant's wartime activities in particular. We recognize that it is always difficult to reconstruct what actually happened at any point in history, and more difficult still when the events of consequence occurred during wartime, in enemy territory, over forty years ago. The task is further complicated here because,

as noted by the district court, "unlike virtually every other reported denaturalization case, there is in this case not one scrap of documentary evidence relating to the pertinent events." *United States v. Kowalchuk*, 571 F. Supp. 72, 75 (E.D. Pa. 1983). In such cases an appellate court should adhere closely to the district court's properly found facts based on that court's determinations of witness credibility.

We note also that no party here has raised any objection to the credibility determinations made below. In light of this, we find it both logically incredible and jurisprudentially disturbing that the dissent dwells on proffered testimony which it claims "described the defendant's direct participation in the murders and brutalities against the Lubomyl Jews," typescript dissent at 7, when it later acknowledges that this precise testimony was found credible "only to the extent that [it] described general conditions in Lubomyl . . . ," *id.*, and not for what it said specifically about appellant. What must be remembered is that our concern here is with *evidence* found credible by the fact finder below, not with *testimony* offered. Our concern here is with appellant's conduct, not the general conditions in war-torn Lubomyl, as horrible as they no doubt were.

The dissent also describes at length the auxiliary role in Nazi atrocities played by "indigenous forces." *Id.* at 3-5. The dissent implies that the Lubomyl militia was exactly such an "indigenous force." While it is undisputed that the Nazis inflicted tyrannical horrors on many local populations, and that some "indigenous forces" aided in the commission of these atrocities, what is of concern here is neither Nazi atrocities *per se* nor the general use of "indigenous forces." What is of concern here is the Lubomyl militia, appellant's role therein, and the effect of that role on his grant of a visa. As stated by the district court below,

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> Although the Nazi regime was characterized by meticulous record-keeping, not one scrap of documentary evidence has ever surfaced which reflects or even refers to the happenings at Lubomyl, the existence of a Lubomyl schutzmannschaft, the extent to which indigenous forces were used by the Germans in that area, etc. Both the Soviet Union and the western allies compiled extensive lists of persons suspected of war crimes; the defendant's name has never appeared on any such list. The Ukrainian militia was never listed as a suspect organization. .

Kowalchuk, 571 F. Supp. at 77.

In 1944, appellant moved to the West, fleeing the advancing Russian armies, and eventually entered a displaced persons' camp in Austria. Because of his family's ardent and generally well known anti-Communist feelings, he did not wish to return to Lubomyl, then under Soviet control.[1] To determine whether he could be

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1. The dissent alleges that, as the Russian army approached Lubomyl, appellant and his family "*voluntarily* left with the German military forces." Typescript dissent at 8 n.6 (emphasis added). The dissent offers no support for such a positive "finding." The district court found this evidence equivocal at best, stating:

> If the defendant's activities [in the Lubomyl militia] had been as innocuous as he claims, there would have been little reason for him to leave Lubomyl with the retreating Germans. It must be admitted, however, that this argument is considerably weakened by the fact that the defendant's parents, at least, had valid reasons for leaving at that time, and it would be quite understandable that the family would wish to remain

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classified as either a refugee or displaced person by the International Relief Organization of the United Nations (IRO), he filed a form CM/1. On this form appellant stated that during the war he lived in Kremianec, not Lubomyl, and that he worked as a tailor, not for the Lubomyl militia. He later explained that he lied on his CM/1 form because he was fearful for his family. He did not know where they were and he knew the Soviet Mission would have access to the information on the form. Moreover, he did not wish to be returned to the Soviet Union. Appellant's misrepresentations as to his residence and employment during the war, set forth on the CM/1 form, were transcribed or appended onto his United States visa application. On the basis of the facts alleged in this application, appellant was granted a visa in 1949. He emigrated to the United States and was awarded United States citizenship in 1960.

II.

Based on Russian-source newspaper articles that surfaced after apellant was awarded citizenship, the Department of Justice became aware of appellant's visa application misrepresentations and brought this denaturalization action. The district court, agreeing with at least some of the government's arguments, revoked Kowalchuk's citizenship on three grounds: (1) that as a member of the Lubomyl militia he voluntarily assisted the enemy; (2) that as a member of the Lubomyl militia he assisted the Nazis in persecuting civilian populations; and (3) that he made a willful,

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> together. Moreover, flight from the advancing Russian army was a widely prevalent mode of behavior.

Kowalchuk, 571 F. Supp. at 76.

material misrepresentation of fact by lying about his wartime residence and employment.

The dissent goes much further than the district court. It argues that appellant made five material misrepresentations: his employment in the Lubomyl militia, his wartime residence in Lubomyl, his special schooling at German expense, his voluntary departure from Lubomyl with the German forces and his membership in the Lubomyl militia. Typescript dissent at 9. Because the dissent fails to explain the difference between membership and employment in the Lubomyl militia, and because we see no difference of significance, we will proceed as though these were substantively the same misrepresentation. As noted above, of these asserted misrepresentations, the district court expressly addressed only those concerning appellant's "residence in Lubomyl and his employment by the town government there during the German occupation." *Kowalchuk*, 571 F. Supp. at 81.

It is not surprising that the district court did not discuss appellant's special schooling or his departure from Lubomyl with the German army as material misrepresentations. First, the court did not find that appellant's leaving Lubomyl with the German army constituted voluntary departure with them. *See supra*, typescript at 8 n.2. The government does not assert that this lack of a finding was erroneous. Second, as to the special schooling issue, the government argued at trial, not that appellant's failure to disclose it was a material misrepresentation, but that it was "a complete fabrication," designed to provide appellant with an alibi for the time when the Nazis liquidated the Lubomyl ghetto. *Kowalchuk*, 571 F. Supp. at 76. Only the dissent, not the government, asserts either of these two alleged misrepresentations as a basis for affirming the district court's order of denaturalization. Therefore, because the factual predicate for one

was not found by the fact finder, because the other runs counter to the government's case in chief at trial, and because the government has not asserted either as an alternative rationale for affirming the district court, we choose not to address either here.

III.

In his appeal, Kowalchuk raises two arguments: (1) that the legal conclusions as to assistance to the enemy, assistance in persecuting civilians, and materiality are in error; and (2) that his due process rights were violated because he was unable to interview favorable witnesses under Soviet control. Because we determine that the legal conclusions of the district court are in error, we will not meet appellant's due process arguments.

In the present case, the government sued to have appellant denaturalized under 8 U.S.C. § 1451(a). This statute provides that a grant of citizenship may be revoked if it was "illegally procured or . . . procured by concealment of a material fact . . . ." For a grant of citizenship to be legally procured, the applicant must have been in the country for at least five years after being lawfully admitted pursuant to a valid visa. 8 U.S.C. §§ 1181(a) and 1427(a)(1). Appellant entered the United States under a visa issued pursuant to the Displaced Persons Act of 1948 (DPA), Pub. L. No. 774, 62 Stat. 1009 (1948), which was enacted by Congress to ease the then existing quota structure and allow for increased immigration of World War II displaced persons into the United States. The DPA included in its definition of persons eligible for entry visas those persons classified as refugees or displaced persons by the IRO. The IRO guidelines excluded from eligibility any person who either "assisted the enemy in persecuting civil populations . . ." or "voluntarily assisted the enemy forces . . . in their operations against the United Nations." Finally, the DPA

provided that anyone who made a willful misrepresentation for the purpose of securing a visa would not be admissible. Therefore, if a person either was not eligible for refugee or displaced person status under the IRO or made a material misrepresentation on his visa application, he could be denaturalized under § 1451(a). *See Fedorenko v. United States*, 449 U.S. 490 (1981).

IV.

Denaturalization proceedings operate with two competing interests at stake. On the one hand, a certificate of citizenship is "an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured." *Johannessen v. United States*, 225 U.S. 227, 238 (1923). And, as the Supreme Court has recognized, there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship:

> Failure to comply with any of these conditions renders the certificate of citizenship "illegally procured," and naturalization that is unlawfully procured can be set aside. As we explained in one of these prior decisions:
>
> > An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congness . . . .
> >
> > . . . .
> >
> > "No alien has the slightest right to naturalization unless all statutory

> requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it . . . and demand its cancellation unless issued in accordance with such requirements."

Fedorenko, 449 U.S. at 506 (quoting *United States v. Ginsberg*, 243 U.S. 472, 474-75 (1917)) (other citations omitted).

On the other hand, however, citizenship is a precious right and, once granted, should be protected against erroneous revocation. Thus, in denaturalization proceedings, Supreme Court teachings make it clear that the government bears a heavier burden of proof than in other civil proceedings. *Schneiderman v. United States*, 320 U.S. 118, 125 (1943). Further, to set aside a grant of citizenship, the government's evidence must be "clear, unequivocal, and convincing" and not leave "the issue in doubt." *Fedorenko*, 449 U.S. at 505 (citing cases); *see also United States v. Riela*, 337 F.2d 986, 988 (3d Cir. 1964). "Any less exacting standard would be inconsistent with the importance of the night that is at stake . . . ." *Fedorenko*, 449 U.S. at 505-06.

We must keep these interests in mind as we proceed to evaluate appellant's contentions. Yet, before so proceeding, it is necessary that we make reference to the various standards of review where, as in the case before us, the validity of both findings of fact and conclusions of law are questioned.

V.

Consistent wit.. Supreme Court doctrine, this court has previously parsed the elements of the fact/law dichotomy and

summarized the appropriate standards of review. We have said that "it is necessary to segregate three distinct concepts which are often implicated in the review of judicial findings. These concepts—basic facts, inferred facts, and ultimate facts—are fundamental to the anatomy of fact finding in the judicial process." *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981). All three concepts are involved in this appeal.

A.

Basic facts are those primary or historical facts either elicited from direct evidence or based on a recital of the external events in question and which depend on the credibility of their narrator. *See Brown v. Allen*, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.). These facts do not require the application of a legal standard to the historical fact determinations. *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963); *see also Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980).

Inferred facts are factual conclusions either based on circumstantial evidence or drawn from basic facts. They "are permitted only when, and to the extent that, logic and human experience indicate a probability that certain consequences can and do follow from the basic facts." *Universal Minerals*, 669 F.2d at 102. As with basic facts, however, no legal precepts are implicated in drawing the permissible factual inferences. *See e.g., Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 116 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). Inferred facts are at times described as circumstantial facts.[2]

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2. What we describe as basic and inferred facts have also been described

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Both basic and inferred facts "must be distinguished from a concept described in a term of art as an 'ultimate fact.' " *Universal Minerals*, 669 F.2d at 102. An ultimate fact is a determination made by a trial court upon which liability turns. It may either be "a conclusion of law or at least a determination of a mixed question of law and fact." *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937); *see also Pullman-Standard v. Swint*, 456 U.S. at 286 n.16 (1982).

The importance of distinguishing among the three facets of fact finding is reflected in the various standards of judicial review. Where either basic facts or facts permissibly inferred therefrom are found by the trial court sitting as a fact finder, neither may be disturbed on review unless they are deemed clearly erroneous. *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948); *Universal Minerals*, 669 F.2d at 102; Rule 52(a), F.R. Civ. P.[3] A review of "ultimate facts" on the other hand "is [typically]

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as "subsidiary facts." *See Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); *Baumgartner v. United States*, 322 U.S. 665, 671 (1944)

3. As we have stated in *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir. 1972):

> "In reviewing the decision of the District Court, our responsibility is not to substitute findings we could have made had we been the fact-finding tribunal; our sole function is to review the record to determine whether the findings of the District Court were clearly erroneous, i.e., whether we are 'left with a definite and firm conviction that a mistake has been committed.' " Speyer, Inc. v. Humble Oil and Refining Co., 403 F.2d 766, 770 (3d Cir. 1968). It is the responsibility of an appellate court to accept the ultimate

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a mixed determination of law and fact that requires the application of legal principles to the historical facts of [a] case." *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980). The factual components the "ultimate fact" are subject to review under the clearly erroneous rule. *Pullman-Standard v. Swint*, 456 U.S. at 286-87 n.16; *Cuyler v. Sullivan*, 446 U.S. at 342; *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972). But its legal components are subject to plenary review for legal error. *Pullman-Standard v. Swint*, 456 U.S. at 286 n.16; *Cuyler v. Sullivan*, 446 U.S. at 342. As the Supreme Court has recently stated, although the clearly erroneous test of Rule 52(a), F.R. Civ. P., "applies to findings of fact including those described as 'ultimate facts' . . . [it] does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed question of law and fact . . . ." *Bose Corp. v. Consumers Union of the United States, Inc.*, ____ U.S. ____, (52 U.S.L.W. 4513, 4517, April 30, 1984). Of particular importance to the case at hand, albeit premised on an analysis of the constitutional issues pertaining to *New York Times v. Sullivan*, 376 U.S. 254 (1964), is the Court's conclusion that an appellate court "may accept all of the purely factual findings of the District Court and nevertheless hold as a matter of law that the record does not contain clear and convincing evidence . . ." of the alleged misconduct. *Bose*, ____ U.S. at ____ (52 U.S.L.W. at 4521).

(Cont'd)

> factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data. Unless the reviewing court establishes the existence of either of these factors, it may not alter the fact found by the trial court.

Therefore, we may reverse ultimate findings of trial courts in denaturalization cases if as to the legal component, there was error made in the identification or application of legal precepts, or if the factual components are deemed clearly erroneous when the evidence in support thereof is viewed in the light most favorable to the defendant. *Schneiderman v. United States*, 320 U.S. at 122; *United States v. Anastasio*, 226 F.2d 912, 917 (3d Cir. 1955). With these precepts in mind, we turn our attention to reviewing the findings and conclusions reached below.

VI.

We consider first the district court's determination that appellant "voluntarily assisted the enemy forces." This is an ultimate finding, and is a mixed question of law and fact. The legal component, that part of the mix subject to our plenary review, is the question of whether the government met its burden at trial of proving a violation of the statute by clear, unequivocal, and convincing evidence so as not to leave the issue in doubt.

We conclude that the narrative facts, upon which the legal conclusion rests, are supported by sufficient evidence in the record so that they are not clearly erroneous. *Krasnov v. Dinan*, 465 F.2d 1298, 1302-03 (3d Cir. 1972). It is essentially undisputed that appellant did work for the Lubomyl militia and that this organization was a component of the Nazi-sanctioned local government. Further, it is a permissible inference to conclude that the militia provided at least some level of assistance to the enemy. But, to prove a violation of the statute and allow for denaturalization, the government had to meet its burden of proving that appellant *voluntarily* assisted the enemy.

The government argues that because appellant was not forced

to work for the militia, his membership therein was, *ipso facto*, voluntary. It rests its case on the testimony of a Mr. Thomas, a United Nations official in charge of immigration eligibility matters during the period in question. Mr. Thomas's recollection was that such voluntary membership would have been sufficient evidence of assistance to the enemy to bar issuance of a visa. Appellant, however, argues that the term "voluntary" means more than mere membership and requires an element of intent-to-aid and purposefulness-of-assistance, neither of which was proven by the government. In support of this, appellant cites the IRO Manual in force at the time which, contradicting Thomas's recollections, indicated that voluntariness requires proof of intent or purpose. Brief for appellant at 24. Appellant also relies on language of the Supreme Court in *Fedorenko*, 449 U.S. at 512, to support the proposition that "voluntariness" means more than simply membership in the militia or minimal assistance to the enemy.

As we have stated, in a denaturalization case, "the facts and the law should be construed as far as is reasonably possible in favor of the citizen." *United States v. Anastasio*, 226 F.2d at 917 (footnotes omitted). Viewing the evidence in this light, we believe appellant's arguments undercut the Thomas testimony and at least raise a substantial question whether membership alone, even if unforced, would have been sufficient to constitute voluntary assistance to the enemy. At a minimum, the government's case on voluntary assistance was inconclusive and not "beyond doubt." Therefore, we conclude, as to the legal component of this ultimate finding, the government has not met its high burden of proof by clear and convincing evidence.

The dissent forcefully disagrees. It argues that membership in the Ukrainian militia would have either led to a presumption

of voluntary assistance or constituted grounds for *per se* ineligibility for a visa. Typescript dissent at 11. We consider these to accord with the same rigid definition of "voluntary assistance" advanced by the government at trial. They ignore the facts, found by the court below, that: (1) notwithstanding massive amounts of Nazi record-keeping "not one scrap of documentary evidence has ever surfaced which reflects or even refers to the happenings at Lubomyl [or] the existence of the Lubomyl schutzmannschaft . . .," *Kowalchuk*, 571 F. Supp. at 77; (2) "the defendant's name . . . never appeared on any . . . list" of suspected war criminals compiled by the allies following the war, *id2.*; (3) "[i]t is not at all clear that, in 1949, membership in or employment by the schutzmannschaft at Lubomyl would have precluded the issuance of a visa," *id.* at 82; and (4) the government was unable to cite to a single instance, prior to the 1950 amendments to the DPA, where a visa applicant was rejected solely because of his association with the Ukrainian militia, *id.* Therefore, even though the dissent's assertions are based on credible evidence, that is not enough. The law requires the government to prove its denaturalization case by clear, unequivocal, and convincing evidence so as not to leave the issue in doubt. When all the evidence is considered here, a cloud of doubt continues to hang over the government's case.

VII.

We now examine the district court's conclusion that appellant "assisted the enemy in persecuting civil populations." This is an ultimate finding and we are required to observe the same analysis here as we did in reviewing the question of voluntary assistance to the enemy. As with voluntary assistance, we believe that the question of whether the basic facts prove the requisite assistance in persecuting civilian populations is one that implicates a legal

component. And here again, the legal precept is whether the government met its high burden of proof.

A.

Appellant argues that he performed only clerical duties for the militia and that he, personally, was not actively involved in any actual persecutions. Here it is important to emphasize the findings of the district court on basic and inferred facts. Specifically, the court found that "defendant was responsible for the distribution of food and other supplies to persons entitled to receive the same by virtue of their employment as part of the local government . . . ." *Kowalchuk*, 571 F. Supp. at 80. It also found that "defendant did occupy a position of some responsibility with the schutzmannschaft. He had his own office there . . .; he typed up and issued duty rosters; he typed the daily reports of police activity, etc. He probably wore a police uniform of some kind, during at least some of his duty hours at the police station." *Id.* at 81. Finally, the court noted "that the evidence is plainly insufficient to constitute clear and convincing proof of defendant's involvment in the massacre [of Lubomyl's Jewish population]." *Id.* These factual findings are not clearly erroneous. *See Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir. 1972).

We find it significant that there were no findings that appellant made any substantive decisions in either his food distribution or clerical positions. Although he did distribute food, he did not decide to whom such distribution would be made. Although he typed the duty rosters, which included assigning patrols within the Jewish ghetto, he did not decide who should go on these patrols, when they should occur, or even that they should occur.

at all.[4] Therefore, although his position in the local militia was "of some responsibility," the responsibility was simply that of a clerk and not that of a decisionmaker. The government does not dispute this but rather responds that this alone is sufficient to prove, by the requisite degree of certainty, that appellant was involved in persecuting the civilian population.

No reported case has yet held this level of involvement to be sufficient assistance in persecution of civilian populations to constitute grounds for denaturalization. The leading Supreme Court case is *Fedorenko v. United States*, 449 U.S. 490 (1981). There, the Court found that a person could be denaturalized where he failed to disclose on his visa application that he had been an armed guard at a Nazi concentration camp. The Court concluded, as a matter of law, that being an armed concentration camp guard constituted sufficient assistance in the persecution of civilians, that, had it been known at the time, would have precluded the issuance of a visa. By way of comparison, the Court speculated that "an individual who did no more than cut the hair of female [Jewish] inmates before they were executed [by the Nazis]" would not have been found to have assisted in the persecution of

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4. As noted by counsel for appellant during a colloquy with the bench at oral argument:

> THE COURT: [The district court] did not find then that [defendant] assigned patrols?
>
> MR. CARROLL: Quite the contrary, sir. The evidence was that Mr. Kowalchuk typed the rosters *prepared by someone else.*

Transcript of oral argument at 42 (emphasis added). This was not controverted by the government.

civilians. 449 U.S. at 512 n.34. In *United States v. Dercacz*, 530 F. Supp. 1348 (E.D.N.Y. 1982), sufficient evidence of assistance in persecution was found where the defendant was a uniformed Ukrainian militiaman who actually went on patrols and rounded up local Jews who violated restrictions. Finally, in *United States v. Osidach*, 513 F. Supp. 51 (E.D. Pa. 1981), denaturalization was ordered upon proof that defendant was in the local militia, working as *both* a patrol officer and a clerk/interpreter.

Osidach, at present, represents the lowest level of activity that a federal court has found sufficient to constitute assistance in the persecution of civilian populations. We do not believe that appellant's conduct herein is of the same character as that in *Osidach*. On the other hand, it is not as blameless as the individual, referred to in *Fedorenko*, "who did no more than cut . . . hair . . ." That this case falls in between makes our task all the more difficult.

B.

The horrors of tyranny inflicted upon civil populations in territories controlled by occupying Nazi forces during World War II are so notorious that no citation is necessary. News accounts, official histories, and thousands of articles, dramas, novels, motion pictures, and television documentaries bear witness to this universal tragedy. Although the holocaust suffered by six million Jews is the apogee of Nazi degeneracy, the Nazis did not limit their ruthless murders, tortures, and terror to members of one particular religious faith. It is a matter of record that 20 million Soviet citizens—civilian and military—perished by the sword of the Third Reich. To a lesser numerical extent, Polish, French, Belgian, Danish and Italian civilians were slaughtered by rand[illegible] firing squads as punishment for violating rules of occupying armies.

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The atrocities carried out by the Nazis against the general populations of occupied countries is further evidenced in a contemporaneous Czechoslovakian account:

> The German terror . . . expressed itself immediately . . . . From the first day [of occupation] mass arrests began among all classes of Czech society . . . . And so in the course of not quite two months some 12,000 Czechs found themselves in prison, to remain there for short or long terms; there were among them politicians, journalists, teachers and professors . . . . The persecution was, however, directed with special emphasis against the supporters of [the pre-occupation government], against judges, Social Democratic politicians and members of factory committees, and finally against officers of the former Czechoslovak army . . .

Czechoslovak Ministry of Foreign Affairs, *Two Years of German Oppression in Czechoslovakia* 48 (Unwin Brothers Ltd., Great Britain 1941).

To facilitate their abilities to persecute local populations, the Nazis took special interest in the local police departments. The Nazis would, of course, oversee all police activities, maintaining more direct involvement in selected police functions, "especially in the sphere of the secret state police and the criminal police . . . while internal security and public order . . . [would be left] in principal to be maintained by the . . . [local] police . . . ." *Id.* at 32-33. As Nazi occupation continued, their control over the subject areas tightened and the suffering of local populations grew. Additional pressures were applied through the local police and, if the police resisted Nazi directives, pressure was applied directly

on them. The Czech experience is, again, instructive. There, "[t]he German ferocity . . . cruelly affected the leading officials of the Czech police. As they would not lend themselves to the persecution of their fellow-citizens and would not help in the barbarous treatment of the prisoners, they were themselves arrested and treated with incredible cruelty." *Id.* at 50.

The situation was even worse in the Ukraine than in other occupied areas. Nazi occupation there was particularly exploitive because the Ukraine figured in a long-term, large-scale German colonization scheme. I. Kamenetsky, *Hitler's Occupation of Ukraine (1941-1944)* 35-38 (Marquette University Press, Wisconsin 1956). While this colonization plan, or *Lebensraum,* was pursued throughout Eastern Europe it was applied with particular zeal in the Ukraine where the Nazis

> regarded all slavs as racially inferior, in fact subhuman, and intended to achieve German objectives not by sophisticated tactics, but by sheer brute force . . . During the period of German occupation, Ukraine thus became a wretched laboratory . . . —[with such experiments as] the mass extermination of the Jews, [and] the deportation and brutalization of Ukrainians—and the German colonization with its inherent feature of enslavement of the inhabitants and the exploitation of the country's resources. Ukraine suffered probably more than any other country . . .

Dmytro Doroshenko, *A Survey of Ukrainian History* 745 (Humeniuk Publication Foundation, Winnipeg 1975). Once the Nazis achieved control in the Ukraine they "launched a dual policy

of annihilation of the politically and ethnically undesirable elements and the enslavement of the remainder." *Id.* at 748. As a result of their merciless techniques in pursuit of their goals of domination, "hundreds of thousands of Jews and Ukrainians . . . were coldly and systematically butchered by the Nazis because they did not fit into Hitler's 'new order.' " *Id.*

C.

Under this type of relentless pressure, and with the alternatives of arrest, torture, imprisonment, and death staring them in the face, it is hardly surprising that many inhabitants of occupied countries were passively accommodating to the Nazis. Many of these undoubtedly were government workers and civil servants who continued in or assumed government positions under Nazi occupation. Under these circumstances, if this large number of Europeans performed government or other service under Nazi occupation, no reasonable person would conclude that each of them "assisted in the persecution of civil populations" and would, thereby, be forever denied even the possibility of American citizenship. Can we say that the baker who delivered bread to the Lubomyl militia was guilty of assisting in Nazi persecutions? Or the bar maid who served beer in the militia headquarters mess hall? Or the char woman or janitor who cleaned the office where Kowalchuk toiled as a clerk? Or the office machine service man who repaired the clerk's typewriter? A line must be drawn. Although to do so is a very difficult, if not ultimately arbitrary, act, we are required to do so in this case whether we affirm or reverse the district court.

We have decided that we should not extend the *Fedorenko-Dercacz-Osidach* line of cases to the facts presently before us. That the present case would require us to redraw this line at all,

that this case falls outside the ambit of previous decisions, is itself persuasive evidence that the proof offered by the government below, that appellant was guilty of assisting in the persecution of civilian populations, was not clear, unequivocal, and convincing and was not so substantial as to "not leave 'the issue in doubt.' " *Fedorenko,* 449 U.S. at 505. Further, consistent with Supreme Court doctrine, we are required by our own decision in *Anastasio* to resolve all doubts in favor of the citizen. Measured against this standard, we conclude that the government did not meet its high burden of proof on this issue either.

VIII.

This brings us to the question of whether appellant's false statements about his residence and occupation during the war were misrepresentations of "material facts" sufficient to have denied him a visa under the DPA. Although the Supreme Court has determined what constitutes misrepresentations of material facts in a *naturalization* proceeding, it has reserved the question as to what should be the formulation in *visa* application cases: "[W]e find it unnecessary to resolve the question of whether *Chaunt's* [*Chaunt v. United States*, 364 U.S. 350 (1960)] materiality test also governs false statements in visa applications." *Fedorenko*, 449 U.S. at 509. In naturalization proceedings the Court has stated that, to prove misrepresentation or concealment of a material fact, the Government must prove by clear and convincing evidence:

> either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

Chaunt v. United States, 364 U.S. 350, 355 (1960). The first prong deals with cases where denial of citizenship could have been premised on the undisclosed information itself. The second prong deals with cases where the undisclosed information would not, in and of itself, justify denial of citizenship but where, had it been known, other facts could have been discovered justifying a denial of citizenship.

What has divided the courts of appeals in visa application cases is not the applicability of *Chaunt,* but rather the import of the second prong of *Chaunt's* denaturalization test. Some courts have held that, in visa cases, the government need only prove that, had the misrepresentation not been made, an investigation would have been conducted which might have uncovered facts warranting denial of a visa. *Kassab v. Immigration & Naturalization Service,* 364 F.2d 806 (6th Cir. 1966); Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961). Other courts, including this one, require more. We require the government to prove not only that, had the correct information been available, an investigation would have been undertaken but that it *would* have uncovered facts warranting visa denial. *See United States v. Riela,* 337 F.2d 986, 989 (3d Cir. 1964); *see also La Madrid-Peraza v. Immigration & Naturalization Service,* 492 F.2d 1297 (9th Cir. 1974); *United States v. Rossi,* 299 F.2d 650 (9th Cir. 1962). We believe that the most well-reasoned explication of this position is in *United States v. Sheshtawy,* 714 F.2d 1038 (10th Cir. 1983). That opinion relied on the analysis of *Chaunt* provided by Justice Blackmun's concurrence in *Fedorenko.* There, Justice Blackmun reasoned that to accept a *might* standard would unreasonably dilute the protections established by prior case law. *Fedorenko,* 449 U.S. at 523 (Blackmun, J., concurring). He concluded that, to succeed in a denaturalization proceeding, under either prong of *Chaunt,* the government must prove "the actual existence of disqualifying

facts—facts that themselves *would* have warranted denial of petitioner's citizenship . . . ." *Id.* (emphasis added).

The dissent takes issue with us over the proper interpretation of the second prong of the *Chaunt* test and accuses us of misreading *Riela*. It asserts that *Riela* is fundamentally a case covered by the first prong of *Chaunt*. We disagree.

In *Riela*, the defendant entered the United States as a stowaway. He failed to disclose this on his petition for citizenship. When this misstatement was discovered, the government instituted denaturalization proceedings asserting that if Riela did enter the country as a stowaway he would not have entered legally and thus would not have been eligible for citizenship. Because lawful entry is one of the prerequisites for receiving a grant of citizenship to the United States the district court granted the government's denaturalization demand. Lawful entry is, however, an ultimate fact or legal conclusion. The fact that Riela entered the country as a stowaway, although clear evidence supporting a legal conclusion of unlawful entry, is not itself a ground for refusing naturalization. It is the legal conclusion that would justify denial of citizenship. Therefore, although the court in *Riela* did not express which prong of *Chaunt* it relied on, careful analysis shows it was the second. *Fedorenko v. United States*, 449 U.S. 490, 520-21 & n.4 (1981) (Blackmun, J., concurring) (accord). Moreover, the majority opinion in *Fedorenko* noted that the district court in that case "rel[ied] on decisions by the United States Court of Appeals for the Third . . . Circuit [] . . . and interpreted both *Chaunt* tests as requiring proof that 'the true facts would have warranted denial of citizenship.' " 449 U.S. at 502 & n.20 (citing *United States v. Riela*, 337 F.2d 986 (3d Cir. 1964)).

Even if the dissent's reading of *Riela* were correct, the result

we reach here would remain unchanged. The lack of unanimity, both within this panel and among the various courts of appeals that have wrestled with the second prong of *Chaunt*, bears witness to the fact that it is not an opinion whose import is clear on its face.

Chaunt states that denaturalization is justifiable if the applicant failed to disclose some fact and its "disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Chaunt*, 364 U.S. at 355. Applied literally, this does not require the government to prove that, had the truth been told, other disqualifying facts would have been discovered. Applied literally, it does not even require the government to prove that, had the truth been told, additional disqualifying facts might "possibly" have been discovered. Applied literally, all the second prong of *Chaunt* would appear to require the government to prove is that, had the truth been told, it "might have been useful" in a subsequent investigation and that the investigation might "possibly lead[] to the discovery" of disqualifying facts. Thus read, *Chaunt* would undermine cases from *Schneiderman v. United States*, 320 U.S. 118 (1943), to *Fedorenko v. United States*, 449 U.S. 490 (1981), which establish that citizenship, once granted, is a precious right; that, in a denaturalization proceeding, the government bears a heavy burden; that it must prove its case by clear, unequivocal, and convincing evidence, so as not to leave the issue unclear; and that, in such cases, all doubt is to be resolved in favor of the defendant. Our research has discovered no case that has ever applied the second prong literally.

Thus, *Chaunt* must be construed beyond the literal meaning of its language. The only significant Supreme Court explication is found in Justice Blackmun's concurrence in *Fedorenko*. There, Justice Blackmun recognized the tension between the

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"Government's commitment to supervising the citizenship process and the naturalized citizen's interest in preserving his status." *Fedorenko*, 449 U.S. at 522 (Blackmun, J., concurring). He noted that when "the Government seeks to revoke [a grant of citizenship], the Court consistently and forcefully has held that it may do so only on scrupulously clear justification and proof." *Id.* at 523. In addressing the second prong of *Chaunt*, Justice Blackmun concluded that it "indeed contemplated only this rigorous standard . . .," *id.*, and that under this prong the government "must prove the existence of disqualifying facts, not simply facts that *might* lead to hypothesized disqualifying facts." *Id.* at 524. Justice Blackmun ended by stating:

> If naturalization can be revoked years or decades after it is conferred, on the mere suspicion that certain undisclosed facts *might* have warranted exclusion, I fear that the valued rights of citizenship are in danger of erosion.

Id. at 525-26. We think that Justice Blackmun's analysis is correct. To be consistent with the Supreme Court's prior and subsequent decisions, the second prong of *Chaunt* must be read as requiring proof, by clear, unequivocal and convincing evidence, of the existence of actual disqualifying facts. Thus, the government must prove that, had the undisclosed facts been known, an investigation would have been conducted and disqualifying facts would have been discovered. Turning again to the present case, we must decide whether the government met its "rigorous standard" of "scrupulously clear justification and proof" under either prong of *Chaunt*.

By the district court's own determinations and our discussion in Parts VI. and VII., *supra*, it is clear that the government did

not meet its burden under the first prong of the *Chaunt* test. The district court determined that the government had not proved facts, which if known, would have warranted denial of the visa. It declared that "[i]t is not at all clear that, in 1949, membership in . . . [the militia] at Lubomyl would have precluded the issuance of a visa." *United States v. Kowalchuk*, 571 F. Supp. 72, 82 (E.D. Pa. 1983).

With the first prong of the test eliminated, we turn to the second: if the facts had been disclosed would they have led to an investigation warranting denial? We have decided that the government failed to prove that appellant's wartime activities constituted either voluntary assistance to the enemy or assistance in the persecution of civilian populations. No additional reliable evidence was presented to indicate that had the misrepresentations not been made appellant's visa application would have been rejected. Therefore, we hold, as a matter of law, that the government has failed to prove by the requisite clear and convincing evidence that, had appellant divulged his actual wartime residence and occupation on his visa application, an investigation would have uncovered facts that would have resulted in the denial of the visa. Bound as we are by this court's precedent, not rejected by the Supreme Court in *Fedorenko*, we do not meet the question of what such an investigation *might* have uncovered.

IX.

Because of the view we take, it is unnecessary to reach the question whether official Soviet restrictions, which precluded the defendant from freely interviewing favorable witnesses in the Soviet Union, amounted to a deprivation of rights under the due process clause.

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The judgment of the district court will be reversed and the proceedings remanded with a direction that judgment be entered in behalf of appellant.

TO THE CLERK:

Please file the foregoing opinion.

/s Aldisert
Chief Judge

Appendix B

RE: UNITED STATES v. SERGE KOWALCHUK, Appellant, No. 83-1571

ROSENN, *Circuit Judge,* dissenting.

The majority reverses the district court's decision to revoke the defendant's citizenship. Because I disagree with the majority's characterization of the facts and its application of the law, I dissent.

The district court concluded that the defendant illegally procured his citizenship by entering this country with an invalid visa. It had two separate grounds for this conclusion. First, the defendant was not a genuine refugee of concern to the International Refugee Organization (IRO) and therefore was ineligible for admission under the Displaced Persons Act of 1948 (DPA), Pub. L. No. 80-774, 62 Stat. 1009 (1948). Second, the defendant was ineligible under section 10 of the DPA because he made material misrepresentations to obtain the visa.

The majority rejects each of these independent grounds for revoking the defendant's citizenship. I believe it distorts the district court's finding of fact with regard to the defendant's role in the Lubomyl schutzmannschaft and misconstrues the law of this circuit with regard to the materiality of the defendant's willful misrepresentations.

I.

These revocation proceedings have their genesis in Serge Kowalchuk's activities shortly after the German military forces occupied Lubomyl in June 1941. Within two or three weeks after occupation, the Germans organized the Ukrainian

schutzmannschaft.[1] Shortly after, the defendant, then an able-bodied twenty-one year old man, suitable for military service, successfully sought out the collaborating mayor of the city for employment.

His first assignment was to the food distribution center serving government employees and the militia. He apparently was in charge, for the only other employee there was his assistant. In about one and one-half months, he was assigned to the schutzmannschaft headquarters across the street. He worked at the food distribution center in the mornings and at militia headquarters in the afternoons. His services were obviously impressive because, as the defendant himself testified, in August 1942 he was sent elsewhere for special training at no expense to him. He was the only selectee from the Lubomyl area in a class of between 45 and 50. Upon the conclusion of his six months "additional training in local administration," he received a certificate of completion and returned to his duties with the Lubomyl schutzmannschaft. He now worked full time with the militia.[2]

To fully appreciate the defendant's role with the schutzmannschaft, an understanding of its function and its crucial importance to the Germans in carrying out the policies of the German army in the Ukraine may be helpful. The majority

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1. The Lubomyl militia was officially known as the schutzmannschaft but was interchangeably referred to by the witnesses as the Lubomyl militia or police force. Prior to the schutzmannschaft, Lubomyl had no police force or militia.

2. Mykola Kowalchuk, defendant's brother, testified that after his brother's supplemental training the defendant was given additional duties in the militia. Mykola further acknowledged that in his 1981 deposition he testified that his brother at times wore a uniform, as did all the schutzmannschaft.

succinctly describes the tyrannical horrors inflicted upon civilian populations in the territories occupied by the Nazi forces. The Germans organized indigenous personnel and formed them into auxiliary bodies. The Lubomyl schutzmannschaft was precisely such a body. These organizations enabled the Nazi forces to carry out their repressive and brutal policies and, at the same time, to wage an aggressive military campaign. As the district court found, "the occupying authorities did rely upon 'indigenous forces,' i.e., segments of the local population, to carry on the functions of government and to enforce the observance of restrictive edicts." *United States v. Kowalchuk,* 571 F.Supp. 72, 80 (E.D. Pa. 1983).

According to Professor Raul Hilberg, an expert produced by the Government at trial, "the availability of an auxiliary force made of Ukrainian personnel was of crucial importance to the Germans, particularly because without them nothing at all could have been accomplished" in carrying out the policies of the German army in the occupied territories. The duties of the indigenous forces included shooting to avoid escapes, performing guard work details, including the guarding of the Jewish ghetto, enforcing the laws and restrictions, arresting violators of restrictive measures and, under certain circumstances, killing Jews. Dr. Hilberg further testified that the sheer numbers of those killed in the liquidation of the Jews required the use of indigenous personnel. As the district court found, the magnitude of the brutal plan to liquidate in one day the 5,000 to 6,000 Jews living in Lubomyl required not only the German soldiers available, but also "significant numbers of Ukrainian militiamen to assist them in escorting the Jews from the ghetto to the execution site, and to prevent escapes." *United States v. Kowalchuk,* 571 F.Supp. at 81.

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Qualifications for the Ukrainian militia/police force were political reliability and physical fitness. Its members were given a certain amount of rudimentary training and they ultimately evolved a recognizable uniform. All indigenous police forces throughout the territory occupied by the German forces in the east were under the jurisdiction of Heinrich Himmler. According to Mykola Kowalchuk, the defendant's brother, the police patrolled the streets, public buildings, and the perimeters of the ghetto, carried arms, and guarded the community's Jews on their death march to the brick factory outside the city. There the Jews were executed en masse in October 1942. As the majority opinion notes, "To facilitate their abilities to persecute local populations the Nazis took special interest in the local police departments" and as the Nazi occupation continued, "the suffering of local populations grew. Additional pressures were applied through the local police." Typescript op. at 24.

On this record, the district court found:.

> What the evidence does establish with the requisite clarity and conviction is that the Lubomyl schutzmannschaft regularly and routinely enforced the martial law restrictions imposed by the Germans, including beating Jews found outside the ghetto after curfew, beating or severely reprimanding Jews who failed to wear the required insignia, assisting the Germans in confiscating valuables from the Jewish inhabitants, arresting and participating in the harsh punishment of persons involved in black-market activities or subversive activities hostile to the German occupation forces; and that the defendant was aware of the responsibilities assigned to the

schutzmannschaft, and occupied a responsible position, albeit largely clerical, within that organization.

. . . It is apparent . . . that members of the schutzmannschaft accompanied the German gendarmes on the many occasions disclosed by the testimony when persons were rounded up for forced labor, or arrested for various supposed infractions; that many of the persons thus apprehended were killed soon afterward; and that members of the schutzmannschaft were present during such executions. Although the evidence does not disclose, with the requisite clarity and conviction, that the defendant personally participated in any of these individual atrocities, the evidence as a whole leaves little doubt that everyone associated with the schutzmannschaft, including the defendant, must have known of the harsh repressive measures which the schutzmannschaft were carrying out pursuant to German direction.

571 F.Supp. at 81.

B.

Upon completion of his special training, including the study of German, the defendant was assigned to full time duties with the militia/police forces, his sole employment until he left Lubomyl. The defendant, as was the case with only the commandant and the deputy commandant, had his own private office. He occupied these quarters for almost three years, the

remainder of the German occupation. According to the defendant, his duties consisted of, among others, the preparation of duty rosters for patrol and guard duties for the entire city, including the ghetto. He admitted that he took the names of the militiamen and assigned them to various locations and to the patrol of the ghetto.[3]

The Government presented nine eyewitnesses to the tragic wartime experience in Lubomyl, six of whom were non-Jewish Soviet residents. Except for Getman, who appeared at trial, the others testified by videotaped deposition and all were vigorously cross-examined by defense counsel. All of these witnesses, most of whom had known the defendant before the war, testified that he served in the Ukrainian police in Lubomyl. Two of them, Fedchuk and Kotsura, served in the militia with Kowalchuk and the defendant recalled assigning them to various patrol duties.[4] Fedchuk and Kotsura also identified the defendant as the deputy commandant of the Ukrainian police in Lubomyl.

Contrary to the majority's assertion that "[t]here was no evidence that appellant . . . directly engaged in persecuting the

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3. The defendant testified:

Q: But just to return, is it your testimony that you did assign patrols that went through the Jewish ghetto of the Ukrainian militia?

A: Not only the ghetto but all parts of the city.

Q: Some were assigned specifically to go to the ghetto?

A: The ghetto.

4. Fedchuk and Kotsura were subsequently punished, presumably by the Soviets, for having rendered service in the Ukrainian militia.

Jewish people," typescript op. at 4, many of the eyewitnesses actually testified to specific atrocities and acts of persecution performed by the defendant personally.[5] A number of them described the defendant's direct participation in the murders and brutalities against the Lubomyl Jews.

The district court credited the testimony of these nine witnesses only to the extent that they described general conditions in Lubomyl, including the atrocities and persecutions generally performed by the schutzmannschaft. The district court viewed the testimony of the Soviet witnesses with skepticism because they were made available by and were under the control of the Soviet government. For various reasons, it also discounted the testimony of the three non-Soviet survivors of Lubomyl.

When the Germans retreated from the Ukraine, the defendant elected to flee with them to Czechoslovakia.[6] The defendant and

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5. Getman described in court in detail the role played by Serge Kowalchuk in appearing at the Getman home and ordering Getman's father onto a truck which removed him to the Jewish cemetery. There, his father was killed. Trimovich, a deposed witness, attended school before the war with the defendant's sister and saw the defendant almost every day before the war. Trimovich testified that, among other atrocities, he personally witnessed in October 1942 the hanging of a Ukrainian woman in front of the Catholic church located near the center of town. He stated that the defendant "kicked out the stool . . . from under the feet of this woman."

6. The record in this case leaves no doubt that the defendant departed voluntarily. The defendant testified that he left on the evacuation train with his family. (App. 1335.) His brother, Mykola, testified that they left voluntarily and "there was but two or three families" from Lubomyl on the train. (App. 1170-1171.) Mykola amplified this testimony on cross-examination with the following:

(Cont'd)

his younger brother, Mykola, ultimately arrived at a displaced persons camp near Salzburg, Austria. After spending four years there, the defendant applied in November 1947 for the necessary clearance certifying that he was a refugee "of concern" to the IRO. To obtain this certification, the defendant executed a required detailed personal history form (the CM/1 form). As the majority notes, the defendant stated on this form that he lived in Kremianec, not Lubomyl, and that he worked there as a tailor. He concealed his service with the militia during the war. The district court stated: "In his CM/1 personal-history form, the defendant intentionally misrepresented and/or concealed his residence in Lubomyl and his employment with the town government there during the German occupation." 571 F.Supp. at 81.

The defendant then took the next step to gain admission to the United States as a permanent resident. For this purpose, he submitted an additional personal history questionnaire, the

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> Q. Sir, on the fragebogen . . . is there a section . . . in which you said you were forcibly transported by the Germans to Czechoslovakia? You used the words "forcibly transported;" is that correct?
>
> A. Yes.
>
> Q. When in fact, as you previously testified, it was your own choice to go or not to go; is that correct?
>
> A. Yes.

(App. 1173.) In its brief to this court, the Government notes, among other misrepresentations of the defendant, "[he] also claimed that he had been forcibly transported by the Germans (GA 26, 30; Gov't Ex. 15A, ¶ 42) when in fact, as he admitted at trial, he voluntarily left Lubomyl (A 1255)."

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"fragebogen," together with his IRO documentation, to representatives of the United States Displaced Persons Commission (DPC). After the required investigation, he was duly certified in 1949 as meeting the eligibility requirements of the DPA. He then applied to the vice consul of the United States at Salzburg, Austria, and on December 29, 1949, he obtained a visa for admission to the United States for permanent residence. His petition for naturalization was granted on November 30, 1960, and he was admitted to citizenship.

The fragebogen opened with the admonition that "all questions must be answered and all information must be complete" and concluded with the attestation that "if it is found to be untrue, incomplete, or misleading in any point, I may be denied entry into the United States." Kowalchuk's responses to the fragebogen were false and misleading in the following respects: (1) Once more, Kowalchuk concealed his employment in the Ukrainian schutzmannschaft by falsely stating that he was a tailor's assistant in Kremianec from 1939 to 1944. (2) Again, he concealed his residence in Lubomyl by falsely stating that he had lived in Kremianec from 1939 to 1944. (3) He only listed attendance at a trade school in Chelm, Poland, between 1936-39 and concealed his special schooling in 1942-1943. (4) He concealed his voluntary departure with the retreating German military forces from Lubomyl to Czechoslovakia, by falsely stating that he left his homeland because he was forcibly transported by the Germans. (5) In response to a question concerning membership in any political, non-political, or paramilitary organization, he falsely replied "none," thereby concealing his membership in the schutzmannschaft.

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II.

To gain lawful admission to the United States for permanent residency under the DPA, the defendant first had to establish that he was a displaced person or refugee of concern to the IRO. *See* DPA, S 2(b). The district court found that the defendant was not "of concern to the IRO" because he "voluntarily assisted the enemy forces," a determination that, under the constitution of the IRO, would have excluded the defendant from eligibility under the DPA as a bona fide refugee or displaced person.[7] The majority challenges that determination.

The majority acknowledges that the district court's determination is "supported by sufficient evidence in the record and [the facts] . . . are not clearly erroneous." Typescript op. at 17. However, it then proceeds to exculpate the defendant on the ground that a substantial question remains whether even voluntary membership would have been sufficient to constitute voluntary assistance to the enemy. In reaching this conclusion, the majority has accepted the defendant's argument that the Government must prove the defendant's intent or purpose to aid the enemy.

The Government points to the testimony of Michael R. Thomas, co-author of the *IRO Manual for Eligibility Officers,* who testified, consistent with the *Manual,* that membership in a police force or militia raised a presumption of voluntariness

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7. Section 2(b) of the DPA, by incorporating the definition of "[p]ersons who will not be [considered displaced persons] contained in the Constitution of the IRO," provided that individuals who "voluntarily assisted the enemy forces . . . in their operations against the United Nations" were ineligible for visas under the Act.

and assistance to the enemy.[8] Furthermore, if an applicant left his home with the retreating Nazis, as this applicant did, he was "not of concern" to the IRO. John Chapin, the American vice consul, testified categorically that persons who served in the Ukrainian police/militia would have been ineligible for a visa. A.P. Conan, the reviewing officer, testified similarly. The applicant could only overcome the presumption against his eligibility by showing that his service was involuntary. This testimony is fully consistent with the *Manual*.

The provisions of the IRO constitution, and the testimony of Thomas, Chapin, and Conan, convincingly rebut the majority's assertion that a substantial question exists whether voluntary membership would have been sufficient "to constitute voluntary assistance to the enemy." Typescript op. at 18.

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8. The Constitution of the IRO, Annex I-Part II, reprinted in Chapter VI of the *Manual*, enumerates categories of persons who will not be the concern of the organization. Section 20 thereof excludes persons who can be shown "to have voluntarily assisted the enemy forces . . . in their operations against the United Nations." A reading of sections 22 and 27 reveals that "assistance to the enemy shall be presumed to have been voluntary" by a member of either "the police, para-military [or] auxiliary organizations." Once an applicant has joined one of such organizations, the only answer for an applicant under the language of section 27 is "to disprove the voluntary nature of his enlistment."

9. The IRO Constitution, reprinted in the *Manual* at chapter VI, section 29, provides:

> The motive underlying an act of assistance to the enemy forces is irrelevant, if a person in fact assisted the enemy forces and did so voluntarily he must be assumed to have been responsible for the reasonable and probable results of his acts; an allegation that he was not pro-German so as much as anti-Communist is, even if true, entirely beside the point.

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The district court also found that Serge Kowalchuk "assisted the enemy in persecuting civilian populations," an alternative basis for its conclusion that the defendant was not a bona fide refugee of concern to the IRO. The majority finds fault with this conclusion, again on the ground that the Government did not meet its high burden of proof. The majority engages in fact-finding apparently on the basis of the self-serving statements of the defendant and finds that the defendant made no substantive decisions in rendering his services 10 for the schutzmannschaft.[10] It therefore finds that the defendant's responsibilities in the Lubomyl police were "simply that of a clerk."[11] The district court

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10. Fedchuk, who served in the police force with the defendant after a three month training period, testified that Kowalchuk "was the deputy commandant and at the same time, the secretary." The defendant issued instructions to the rank-and-file in the force. Fedchuk further testified that the commandant and Kowalchuk issued the instructions to guard the ghetto. Kotovich, who prior to the war was a schoolmate of the defendant, also testified that Kowalchuk was the deputy commandant. Kotovich described how the defendant ordered his arrest and his beating in the defendant's private office. The district court chose to ignore this testimony and I therefore do not rely on it. Ignoring it, however, does not prove the converse — that the defendant made no substantive decisions.

11. The majority makes comparisons of the defendant's duties in the schutzmannschaft with duties performed by menial servants. Comparisons are generally risky, especially in the complex realm of human behavior. How can one compare, as the majority suggests, see typescript op. at 26, a uniformed, specially trained member of an armed para-military organization who "occupied a responsible position" as a collaborator over a period of almost three years, with a baker who delivers bread to the militia, or a bar maid who serves beer, or a char woman who cleans the defendant's office. The latter perform menial duties; they hold no position of responsibility — not even membership in a paramilitary organization engaged in carrying out "harsh repressive measures." 571 F.Supp. at 81.

however, found that the defendant "occupied a responsible position . . . within that organization," a finding supported by the evidence, even if the Government's eyewitness testimony is ignored. The defendant concedes that he, together with his assistant, made the distributions at the food center. He acknowledged that he assigned Fedchuk and Rotsura to patrol duties. A simple clerk would not have occupied private headquarters on the same level with the commandant and deputy commandant. A simple clerk would not have been singled out from the police force for six months special training at full government expense. As the district court observed:

> It is impossible to avoid the inference that the defendant had found favor with the Nazi occupiers of Lubomyl, and was being trained for even greater service in the future.
>
> If the defendant's activities had been as innocuous as he claims, there would have been little reason for him to leave Lubomyl with the retreating Germans.

571 F.Supp. at 76. A simple clerk would not have been offered the opportunity for himself and his family to leave for Czechoslovakia with the fleeing Nazis.

Accordingly, I believe that there is no basis for rejecting the district court's findings pertaining to the defendant's assistance to the enemy in operations against the United Nations and in assisting the enemy in the persecution of civilians.

III.

A grant of citizenship may be revoked if it was "illegally procured or . . . procured by concealment of a material fact

. . . . 8 U.S.C. § 1451(a) (1982). If all the preconditions to naturalization are not met, citizenship is "illegally procured" and may be revoked. *Fedorenko v. United States*, 449 U.S. 490, 506 (1981). To obtain a grant of citizenship, an applicant must have entered the United States pursuant to a valid visa. An applicant ineligible under the law may not obtain a valid visa.

Kowalchuk obtained his visa and entered this country under the provisions of the DPA. Congress enacted the DPA "[t]o authorize for a limited period of time the admission into the United States of certain European displaced persons . . . ." DPA, preamble. The Act did not provide that all qualified applicants were to be admitted. In contrast, the Act enumerated certain automatic exclusions from eligibility. Section 10 stated:

> No eligible displaced person shall be admitted into the United States unless there shall have first been a thorough investigation and written report . . . regarding such person's character, history, and eligibility under this Act. The burden of proof shall be upon the person who seeks to establish his eligibility under this Act. Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States.

In this case, it is undisputed that Kowalchuk "willfully ma[d]e a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person." In reversing the district court, however, the majority holds that Kowalchuk's misrepresentations about his wartime activities were not

"material."[12] I disagree.

A.

In *Chaunt v. United States*, 364 U.S. 350 (1960), the Government attempted to revoke the petitioner's citizenship on the ground that he had made several misrepresentations in his application for citizenship. The district court cancelled the petitioner's naturalization, and the court of appeals affirmed. The Supreme Court reversed, finding that Chaunt's misrepresentations were not material. At issue was Chaunt's failure to reveal arrests that were made more than five years prior to the time of naturalization. The Court stated that "[t]he totality of the circumstances surrounding the offense charged makes them of extremely slight consequence," *id.* at 354, and therefore would not of themselves have provided a ground to deny citizenship. The Court also rejected the Government's argument that had it

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12. It is worth noting that the statute on its face does not require a "material" misrepresentation to render an applicant ineligible. In Fedorenko v. United States, 449 U.S. 490, 507 (1981), the Court interpreted the statute to include a materiality requirement. The Court analogized the DPA to the denaturalization statute, 8 U.S.C. § 1451(a) (1982), which authorizes denaturalization for "concealment of a material fact or . . . willful misrepresentation." In *Fedorenko*, the Court attached the materiality standard to the DPA even though there was no mention of it in the statute. The DPA was amended in 1952 to exclude any alien who seeks to procure a visa "by willfully misrepresenting a material fact." Immigration and Nationality Act of 1952, § 212(a)(19), Pub. L. No. 82-414, 66 Stat. 163, 183 (codified at 8 U.S.C. § 1182(a)(19) (1982)). The reason for the amendment is stated in H.R. Rep. No. 1365, 82nd Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1704, and is based on the belief that misrepresentations having no bearing on the material issues involved, such as place of birth or personal data, statements often made under duress to avoid repatriation, should not serve as a basis for exclusion.

known of the arrests it might have investigated Chaunt further and might well have discovered a link between him and the Communist Party, explaining that the information that Chaunt had disclosed revealed a more tenuous nexus with the Communist Party than the undisclosed arrests did. *Id.* at 355.[13] The Court then concluded that the decision to denaturalize Chaunt should be reversed because

> the Government . . . failed to show by "clear, unequivocal, and convincing" evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

Id. at 355.

The Court in *Chaunt* thereby devised a two-pronged test for materiality in denaturalization cases. Under the first prong, the Government must prove that a truthful answer to a question would have disqualified an applicant. In the alternative, the Government may prevail under the second prong. The second prong deals with a situation in which the truthful answer to a question would not by itself disqualify the applicant. The Government may still demonstrate that the misrepresentation is material if it shows that the truthful answer "might have been useful" in an investigation

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13. The Court, however, stated: "Had that disclosure not been made on the application, failure to report the arrests would have had greater significance. It could then be forcefully argued that failure to disclose the arrests was part and parcel of a project to conceal a Communist Party affiliation." 364 U.S. at 355.

of the applicant "possibly leading to the discovery of other facts warranting denial of citizenship."

In *United States v. Fedorenko*, 449 U.S. 490 (1981), the Supreme Court affirmed the court of appeals' decision ordering Fedorenko's denaturalization. Without deciding the question of whether the *Chaunt* materiality test also governed false statements in visa applications, the Court reasoned: "At the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." *Id.* at 509.

Since *Fedorenko*, the Eleventh Circuit has applied both prongs of the *Chaunt* test in the context of a visa case in *United States v. Koziy*, 728 F.2d 1314 (11th Cir. 1984). Koziy had failed to reveal in his visa application that he had been a member of the Ukrainian police. In affirming the revocation of Koziy's citizenship, the court of appeals stated:

> The district court found that Koziy never disclosed his membership in the Ukrainian Police Force. It ruled that if he had disclosed his connection with the police force in his visa application, his application would have been rejected outright, or at the least an investigation would have commenced which might have led to a denial of citizenship . . . . These findings are not clearly erroneous.

Id. at 1320.

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B.

In the instance case, had the defendant revealed on December 29, 1949, the day he obtained his visa from the vice consul, the facts which he suppressed, those facts would have warranted the denial of his visa and thereby precluded him from obtaining citizenship. As previously noted, the defendant willfully concealed his voluntary membership and employment in the Ukrainian militia/police force, his attendance at the special training school during the German occupation, and his voluntary departure to Czechoslovakia with the retreating German military forces. Thomas, chief eligibility officer for the IRO in 1948, testified that under its mandate the DPC would only accept refugees who were eligible for IRO assistance. Under the IRO Constitution, he stated, persons who collaborated with the enemy were ineligible for assistance even though they were refugees. If an applicant voluntarily assisted the enemy, "he was not of concern of the IRO." The burden to prove eligibility for IRO assistance was on the applicant, and his CM/1 form became the basic document upon which the field eligibility officer depended. Membership in a police force or militia raised a presumption of voluntariness and assistance to the enemy. Furthermore, according to Thomas, if the applicant left home with the retreating Nazis, he was "not the concern" of the IRO. He also stated that membership in a police force or paramilitary organization made an applicant ineligible for assistance because such activity constituted voluntary assistance to the enemy. The applicant's functions in the police were not important in the determination of eligibility.

Chapin, American vice consul in 1948 in Salzburg, Austria, testified that the IRO documents, the fragebogen, and the DPC's investigation and report accompanied the application for a visa. The standard procedure in every case was to read the fragebogen. Close attention was paid to the applicant's occupation and

residence during the war years and the applicant had the burden under the law of proving eligibility for a visa. Persons who had served in the Ukrainian police or militia would have been ineligible.

Conan, employed by the DPC between 1948 and 1952, served a stint as the senior officer in charge of the Commission's activities for the British zone. He essentially reviewed the eligibility of those whose applications the Commission proposed to reject. He testified that an applicant who had served in the Ukrainian schutzmannschaft would have been rejected unless he overcame the presumption against his eligibility by showing that his service was involuntary and that he had not committed atrocities or persecuted any person on the ground of religion. Such an applicant would have been rejected even if the Ukrainian schutzmannschaft were not on a list of inimical organizations. Government exhibits demonstrate that applications in fact had been rejected in 1952 by the DPC under section 13[14] of the Act on the ground of such membership. Moreover, Conan stated that applications of a member of the Ukrainian schutzmannshaft *would have been rejected prior to the 1950 amendment of the DPA.*[15]

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14. Section 13 of the DPA provides: "No visa shall be issued under the provisions of the Act to any person who is or has been a member of, or participated in, any Movement which is or has been hostile to the United States . . ." This section provides another independent ground for ineligibility for a visa in this case.

15. He testified:

Q. Mr. Conan, would a member of the Ukrainian schutzmannshaft have been rejected prior to the amendment of the Displaced Persons Act in June 1950?

A. Yes, he would have been rejected.

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Whatever the defendant's motivation,[16] the misrepresentations and concealment were material to the IRO's determination in 1947 of whether Kowalchuk was a bona fide refugee or "of concern" to the IRO. They were plainly material to the vice consul's determination in 1948 that declared Kowalchuk eligible for admission to the United States as a permanent resident. The evidence of willful misrepresentation, concealment, and materiality are clear, convincing, and unequivocal. Regardless of whether the defendant personally participated in the atrocities and brutalities committed by the Lubomyl schutzmannschaft, the district court found, even discounting the Government's eyewitnesses to the Lubomyl tragedies, that the "defendant was aware of the responsibilities assigned to the schutzmannschaft, and occupied a responsible position, albeit largely clerical, within that organization." 571 F.Supp. at 81. Truthful answers on the CM/1 and the fragebogen would have prevented the defendant from obtaining a visa under the DPA.

C.

Assuming *arguendo* that the defendant's misrepresentations were not material under the first prong of the *Chaunt* test, they were material under the second prong. Under the second prong of *Chaunt*, the Government must prove that the disclosure of the suppressed facts "might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355. The majority misconstrues the second prong of *Chaunt* and the case law interpreting *Chaunt*:

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16. The defendant testified that he made the misrepresentations of residence to the IRO to conceal possible retaliation by the Soviets to his parents. However, his brother, Mykola, previously had truthfully stated his residence in Lubom, to the IRO and the defendant knew this.

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"What has divided the courts of appeals in visa application cases is not the applicability of *Chaunt*, but rather the import of the second prong of *Chaunt*'s denaturalization test . . . . We [the Third and Ninth Circuits] require the government to prove not only that, had the correct information been available, an investigation would have been undertaken but that it *would* have uncovered facts warranting visa denial. *See United States v. Riela*, 337 F.2d 980, 989 (3d Cir. 1964) . . ." Typescript op. at 28 (citations to Ninth Circuit cases omitted).

Contrary to the majority's assertions, *see* typescript op. at 28, there was no actual division in the courts of appeals prior to *Fedorenko*[17] over the interpretation of the second prong of *Chaunt*.[18] In the years following the *Chaunt* decision, the courts of appeals applied the *Chaunt* test. *See La Madrid-Peraza v. INS*, 492 F.2d 1297 (9th Cir. 1974) (per curiam); *Kassab v. INS*, 364 F.2d 806 (6th Cir. 1966); *United States v. Riela*, 337 F.2d 986 (3d Cir. 1964); *United States v. Oddo*, 314 F.2d 115 (2d Cir.), *cert. denied*, 375 U.S. 833 (1963); *United States v. Rossi*, 299 F.2d 650 (9th Cir. 1962); *Langhammer v. Hamilton*, 295 F.2d 642 (1st Cir. 1961). In *Langhammer*,[19] *Oddo*,[20] and *Kassab*,[21] the

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17. Except for *United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir. 1983), all of the cases cited by the majority are pre-*Fedorenko*.

18. Nor has any court of appeals suggested that a different standard applies in visa applications than in denaturalization cases.

19. A year after the *Chaunt* decision, the court in *Langhammer* ordered a deportation because an alien failed to disclose membership in the Communist Party in his application. The court rejected Langhammer's argument that the investigation that would have followed the disclosure would have revealed that his membership was involuntary and that he therefore would have been eligible

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courts applied the second *Chaunt* test and found that a misrepresentation was material if its disclosure would have led to an investigation that might have uncovered other disqualifying

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as a quota immigrant. "In essense he [Langhammer] argues that a misrepresentation is not material unless the alien would definitely have been excluded on the true facts. We do not believe this to be the law . . ." *Id.* at 648. The *Langhammer* court thereby emphasized that the second prong in *Chaunt* did not require a showing that the disclosure of all of the facts following a full investigation would have precluded an applicant from obtaining a visa.

20. The defendant in *Oddo* claimed that his failure to disclose a series of past arrests did not justify the revocation of his citizenship because such a record would not have automatically disqualified him from obtaining citizenship. Writing for the panel, then Judge Marshall (later the author of the Supreme Court's opinion in *Fedorenko*) rejected this analysis. "Failure to disclose a record of arrests, even though none of those arrests by itself would be a sufficient ground for denial of naturalization closes to the Government an avenue of inquiry *which might conceivably lead to collateral information of greater relevance.*" 314 F.2d at 118 (emphasis added). The court thereby held that the Government need not prove that an applicant would have been found ineligible had the investigation occurred.

21. The court held that Kassab was subject to deportation since he had procured a visa by "fraud and willful misrepresentation of a material fact." 364 F.2d at 807. Kassab had obtained his visa because he was married to a lawful resident alien. He failed to reveal that his wife had commenced an annulment proceeding. The court cited *Langhammer* and *Chaunt* and held that it need not "be shown that petitioner *would not* have procured his visa if the true facts had been known. It is sufficient that if the fact of the annulment proceeding had been revealed, it *migth* have led to further action and the discovery of facts which would have justified the refusal of the visa." *Id.*

facts. This court in *Riela*, and the Ninth Circuit in *Rossi*[22] and *La Madrid-Peraza*,[23] used different language in their applications of the *Chaunt* test. A careful examination of these cases, however, reveals that the reason this difference arises is because the facts in these cases required only *prong one* analysis.

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22. Rossi had used his deceased brother's name to gain admission to the United States because he believed that the applicable immigration quota was filled and that he could not enter the country in his own name. The Government argued that Rossi's misrepresentations on a visa application justified revocation of his citizenship "without regard to the effect true answers would have had on his application." *Id.* at 651. The court properly rejected the Government's argument, holding that under the *Chaunt* test "proof of Rossi's intentional misrepresentation was not alone enough to divest him of citizenship . . . [t]he materiality of the misrepresentation may be determined by the bearing it had upon his right to enter this county . . . ." *Id.* at 652.

The language in the *Rossi* case is very confusing. A careful examination of its holding reveals that it was a prong one case, and not a prong two case. Rossi was asked his nationality and he entered a false response. According to the court, the true answer to the question would either have been material because the applicable immigration quota was filled or immaterial because it was not. There is no suggestion in the case that a truthful answer would have caused any further investigation into Rossi's background. Because the Government apparently did not assert that Rossi's misrepresentation allowed him to evade an investigation, there was no need for the court to engage in prong two analysis.

23. The INS found La Madrid-Peraza to be deportable because she obtained her visa through a misrepresentation in her labor certificate. In her application, La Madrid-Peraza overstated the wages that she was to receive from her prospective job. Under federal regulations, she was not eligible to receive a labor certificate if her prospective job paid less than the prevailing wage rate. Although the Government produced evidence that La Madrid-Peraza overstated her wage rate, there was no evidence that she was actually paid at less than the prevailing rate.

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The majority mischaracterizes the law of this court by misinterpreting the *Riela* decision. In 1964, this court applied the *Chaunt* test in *United States v. Riela*, 337 F.2d 986 (3d Cir. 1964). Riela arrived in the United States as a stowaway. He filed fraudulent papers of admission and a petition for citizenship concealing his true identity by substituting another alien's name, birthday, place of origin, time of arrival, and travel plans upon arrival. After noting that mere provision of false answers would be insufficient to revoke Riela's citizenship, the court noted that "[t]he false answers given by the defendant were material if they resulted in the suppression of facts which, if known, would have warranted denial of citizenship."[24] *Id.* at 989. The court then examined the record and found that the false answers on the

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The court cited *Rossi* and reversed the deportation order because the Government failed to show that disclosure of her actual wages would have disqualified her. The court properly applied prong one analysis, citing *Chaunt*: "[T]he Government must prove that if the truth had been disclosed, it would have warranted denial of citizenship." *Id.* at 1298. As in *Rossi*, a truthful answer would not have led the Government to investigate the petitioner further — either it would or would not have disqualified La Madrid-Peraza. Therefore, there was no need for the court to engage in prong two analysis.

The court also cited *Rossi* for the following proposition: "a fact suppressed or misstated is not material to an alien's entry unless the truth would have justified a refusal to issue a visa." 492 F.2d at 1298. This statement is correct with regard to prong one of *Chaunt*, the relevant test applied in both *Rossi* and *La Madrid-Peraza*. There is no reason to believe that either court intended this language to apply in a case involving the second prong in *Chaunt*.

24. The court's language is almost a verbatim recital of the first prong of the *Chaunt* test. The Government may prevail in a denaturalization case if it proves "(1) that facts were suppressed which, if known, would have warranted denial of citizenship . . . ." 364 U.S. at 355.

naturalization documents "were material because they resulted in the suppression of facts which, if known, would have barred the naturalization of the defendant because of his obvious failure to meet the statutory requirements." *Id.* at 989. The court thus held that the misrepresentations were such that, if the questions were answered truthfully, Riela would have been denied citizenship automatically and immediately. Because the truthful answers to the questions on the forms themselves disqualified Riela, an investigation to uncover additional facts was unnecessary. Riela was denaturalized under the first prong of the *Chaunt* test, and the court therefore did not address the second prong, an alternative ground on which to find materiality.

The majority asserts that the proper test under the second prong of *Chaunt* is whether "an investigation would have been undertaken . . . that . . . *would* have uncovered facts warranting visa denial." *See* typescript op. at 28. The only Third Circuit case cited by the majority for its position is *Riela.* Because *Riela* is not relevant to a discussion of the second prong of *Chaunt*, the majority is compelled to rely on the court's reading of *Chaunt* in *United States v. Sheshtawy,* 714 F.2d 1038 (10th Cir. 1983). *See* typescrip op. at 29. In *Sheshtawy,* the defendant, arrested for concealing stolen property three weeks before his naturalization hearing, failed to make this disclosure on a standard form questionnaire updating his petition for naturalization. In seeking the defendant's revocation of citizenship in *Sheshtawy*, the Government, unlike its position in this case, did not allege or produce evidence pertaining to the existence of any underlying disqualifying facts. Typescript op. at 29. The court in *Sheshtawy,* as does the majority here, relied on Justice Blackmun's concurrence in *Fedorenko.*

The majority's interpretation and the Tenth Circuit's reading of *Chaunt* are in direct conflict with the interpretation that has

been consistently applied by five of the circuit courts of appeals. *See Koziy, supra* (11th Cir. 1984); *United States v. Fedorenko*, 597 F.2d 946 (5th Cir. 1979); *Kassab, supra* (6th Cir. 1966); *Oddo, supra* (2d Cir. 1963); *Langhammer, supra* (1st Cir. 1961). Until *Sheshtawy*, no court of appeals varied from the standard interpretation of *Chaunt*. Under the second prong of the *Chaunt* test, a misrepresentation is material if its disclosure "*might* have been useful in an investigation *possibly* leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355 (emphasis added). The majority's standard is that a misrepresentation is material if as a result of its disclosure "an investigation would have been untertaken . . . that . . . *would* have uncovered facts warranting visa denial." Typescript op. at 28. The majority has replaced a "materiality" test with an "outcome determinative" test and has thereby transformed, without any plausible explanation, the words "might" and "possibly" to "would."[25]

The majority's interpretation not only conflicts with the language of *Chaunt* and its interpretation by five circuits, but it also strays from the standard legal definition of the term materiality.

> [A] misrepresentation is generally deemed material if it is shown that the correct facts would have a bearing on the action of a decision maker. The term "materiality" has been given this meaning in the Federal securities laws, the law of torts, and

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25. *Chaunt* stands for the proposition that a misrepresentation is material if its "disclosure might have been useful in an investigation possibly leading to the discovery of other facts *warranting* the denial of citizenship." 364 U.S. at 355 (emphasis added). "Warranting" means p...ai.ting or justifying. It does not mean requiring. *See Langhammer*, 295 F.2d at 648.

> the law of contracts. . . . Within the immigration laws themselves a similar meaning has been given to statutory materiality requirements. *See Chaunt* . . . .

Castaneda-Gonzalez v. INS, 564 F.2d 417, 431 and n.29 (D.C. Cir. 1977) (citations omitted).

An understanding of the policy behind the DPA also compels a rejection of the majority's proposed test. Indeed, the facts of this very case illustrate the problems with the majority's formulation. The misrepresentation and the accompanying facts in this case are in stark contrast to the inconsequential nondisclosures that Congress and the court have chosen to absolve. The majority does not deny that Serge Kowalchuk willfully misrepresented his wartime activities and that if he had disclosed the truth a further investigation would have occurred. That investigation might have revealed the evidence produced at trial or, for that matter, confirmed the eyewitnesses' testimony of Kowalchuk's personal participation in brutal atrocities.[26] Even the evidence revealed at trial would have raised, at the very least, serious questions in the mind of the vice counsel concerning

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26. The majority's ruling encourages lying on application forms because no penalty whatever is paid for a misrepresentation. At worst, the majority places Kowalchuk in the same position he would have been had he told the truth, only now the burden of proof is placed on the Government not Kowalchuk. Under the majority's standard, the Government must prove, by clear and convincing evidence, that there was a willful misrepresentation, that an investigation would have occurred, that actual facts existed that would hav disqualified Kowalchuk, and that they would have been uncovered.

whether to admit Kowalchuk.[27]

For these reasons, I believe that defendant's willful misrepresentations were material under *Chaunt's* second prong because truthful answers to the questions would have led to an investigation that might have revealed facts raising a substantial question of eligibility.

IV.

In sum, the district court revoked the defendant's citizenship on the following independent grounds: (1) The defendant was not a genuine refugee "of concern" to the IRO and therefore was not entitled to the benefits of the Displaced Persons Act because (a) he assisted the Nazis in persecuting civilians in his role as a member of the schutzmannschaft, and (b) because in such capacity he voluntarily assisted the enemy forces in their operations against the United Nations, and (2) The defendant illegally obtained his visa because he made willful material misrepresentations to gain admission to the United States as a permanent resident. I believe that the record fully supports the

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27. Recently, Judge Tuttle, writing for the court in United States v. Palciauskas, 734 F.2d 625 (11th Cir. 1934), emphasized that the Government is not required to prove that actual facts existed that would have disqualified the applicant. The court found that the failure of the defendant to disclose his office as mayor was material. It held that the defendant's contention that his position was impotent was for the government authorities to determine on the basis of truthful information in 1949, not for the defendant to decide for himself then, or for the court to decide now.

trial judge's findings and his conclusions. I therefore dissent and would affirm the judgment of the district court.[28]

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28. Because I would affirm the district court, I address the defendant's contention that he was denied due process. He asserts that when his counsel was in the Soviet Union for the depositions of the government witnesses, the Soviet Union denied him the opportunity to visit Lubomyl to investigate or interview potential witnesses. However, as the district court observed, Soviet Russia also imposed the same limitations upon Government counsel. The defendant does not make any claim that he was deprived of any specific evidence or testimony. He makes no showing that any testimony has been excluded that "would have been material and favorable to his defense." United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

At one point, defense counsel informed the Government that he knew of eighteen witnesses in the Soviet Union whom he would like to call. Yet, he made no request to interview any of them or to depose them. On the other hand, the Government by letter dated March 12, 1980 informed defense counsel that it was requesting permission from the Soviet Union to bring the deposed witnesses to the United States to testify and offered "to make a similar request on behalf of the Kowalchuks that specific witnesses be produced to testify on their behalf." The defense failed to follow through on the Government's offer. Their request to interview witnesses was made only after defense counsel was in the Soviet Union and even then it was made informally. Moreover, the trial court's factual conclusions are based upon the testimony of the defendant and his witnesses or other evidence not inconsistent with that testimony. 571 F.Supp. at 80.

I see no merit to the defendant's due process contention.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED JULY 1, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 77-118

UNITED STATES OF AMERICA,

Plaintiff

v.

SERGE KOWALCHUK, a/k/a SERHIJ KOWALCZUK,

Defendant

OPINION AND ORDER

FULLAM, J. JULY 1, 1983

Invoking § 340(a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, as amended, 8 U.S.C § 1451(a), the Government in this action seeks an order revoking the citizenship of the defendant, Serhij Kowalczuk, on the ground that his naturalization was "illegally procured or . . . procured by concealment of a material fact or by willful misrepresentation."

In any such case, the Government bears a heavy burden of proof. *Costello v. U.S.*, 365 U.S. 265, 269 (1961). In order to justify revocation of citizenship, the evidence must be "clear, unequivocal, and convincing," such as not to leave "the issue in doubt". *Schneiderman v. U.S.*, 320 U.S. 118, 125. "Any less

exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding." *Federenko v. U.S.*, 449 U.S. 490, 505 (1980). As stated by the Third Circuit Court of Appeals in *U.S. v. Riela*, 337 F.2d 986, 988 (3d Cir. 1964):

> "This burden is substantially identical with that required in criminal cases—proof beyond a reasonable doubt [citing *Klapprott v. U.S.*, 335 U.S. 601, 612 (1949)]."

An essential prerequisite to a lawful grant of citizenship is that the applicant's admission to this country to establish residence was itself lawful. The defendant was admitted to this country pursuant to the Displaced Persons Act of 1948, 62 Stat. 1009 (hereinafter "DPA"), enacted by Congress in 1948 to enable European refugees uprooted by World War II to emigrate to the United States without regard to established immigration quotas. Section 10 of the DPA, 62 Stat. 1003, placed the burden of proving eligibility under the Act on the person seeking admission and provided that "any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." Moreover, the DPA's definition of "displaced persons" eligible for immigration incorporated the definition of "refugees or displaced persons" contained in Annex I to the Constitution of the International Refugee Organization of the United Nations (IRO), which became effective on August 20, 1948, and thus excluded from eligibility all persons who had "assisted the enemy in persecuting civil populations . . ." or had "voluntarily assisted the enemy forces . . . in their operations against the United Nations." In addition, § 13 of the DPA made ineligible for visas thereunder "any person

who is or has been a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States."

The defendant, Serhij Kowalczuk, together with his younger brother Mikola Kowalczuk, spent four years (1945 through 1949) at a displaced persons camp at Lexenfeld, Austria, near Salzburg. In November 1947, the defendant obtained the necessary clearance from the IRO certifying that he was indeed a refugee "of concern" to IRO. This rendered him eligible for consideration for resettlement. In order to obtain this certification, the defendant executed a detailed personal-history form (the CM/1 form).

In due course, after sponsorship in this country had been arranged, the defendant presented his IRO documentation, together with an additional personal-history questionnaire ("fragebogen") to representatives of the Displaced Persons Commission. After the required further investigation, the defendant was duly certified in 1949 as meeting the eligibility requirements of the DPA. He then applied to the Consular Service for a visa, which was granted, and he was duly admitted to the United States for permanent residence in late 1949. Thereafter, his petition for naturalization was granted on November 30, 1960, and he was thereupon admitted to citizenship.

The essential thrust of the Government's contentions in the present case is that the defendant served as deputy commandant of a unit of the Ukrainian militia in Lubomyl, Ukraine, from 1941 to 1944, that during this period, the Lubomyl unit of the Ukrainian militia, and the defendant personally, committed acts of atrocity and repression against Jewish inhabitants of Lubomyl, and in general assisted the German cause in the war; and that, throughout the entire process leading to his naturalization, the

defendant willfully concealed and intentionally failed to disclose these facts.

The Government's evidence includes the testimony of three Jewish survivors of Lubomyl, to the effect that a local Ukrainian militia, or schutzmannschaft, was established by the Germans shortly after they occupied the town in June 1941; that the defendant was a high-ranking officer of the Lubomyl schutzmannschaft; that members of this police force actively assisted the Germans in their acts of repression and atrocity against the Jewish residents of the town; and that the defendant personally committed various specified atrocities. In addition, several persons now residing in the Ukraine testified, by deposition, that they had served in the Lubomyl militia under the defendant's leadership; that they had assisted in or witnessed various acts of atrocity and repression, etc.

On the other hand, the defendant, corroborated by his brother and various other witnesses, steadfastly and vehemently denies that he ever committed or had direct personal knowledge of any atrocities; that he occupied any position of authority in the Lubomyl police force; that he was issued a uniform or carried a weapon; and that his involvement with the Lubomyl militia (which was only on a part-time basis) actually constituted "membership" in that organization. The defendant's position is that he worked for the local government of the Town of Lubomyl in a clerical capacity. His principle job had to do with food-distribution and rationing, and was performed at a food warehouse; but he did do part-time work for the local police department, typing duty-rosters, requisitions, reports, etc. He never wore a uniform while on duty and never did any street patrolling or other enforcement activity.

Appendix C

If the defendant personally committed the serious atrocities against the Jews of Lubomyl charged by the Government, cancellation of his citizenship in this proceeding would be inevitable, for a variety of reasons. A person guilty of assisting the Nazis in such persecutions would not have been "of concern" to the IRO, and thus would not have met the definition of a displaced person udner the DPA. Concealment of that history would, at some stage of the proceeding, constitute a willful misrepresentation or concealment of material facts for purposes of gaining entry to the United States, rendering such entry illegal and hence disqualifying. And, arguably at least, failure to disclose such a history in connection with the naturalization petition would amount to willful concealment of criminal activity; and such lack of candor might demonstrate lack of good moral character at the time of the naturalization petition.

If the defendant was a member of the Ukrainian militia, but did not personally participate in or have direct knowledge of acts of atrocity and repression, the question would be whether the Ukrainian militia at Lubomyl constituted an organization which did assist the Nazis in persecuting civilians, and, if so, whether mere membership in such an organization would be disqualifying. The remaining question, under that scenario, would be whether willful misrepresentation or concealment of a material fact has been established.

And finally, if it is determined that the defendant was not actually a member of the Lubomyl militia but merely carried out civilian duties for the town government, the question would be whether failure to disclose such employment (and his residence at Lubomyl) on the various personal-history forms (the CM/1 form and the fragebogen) is a sufficient basis for revocation of citizenship in this proceeding.

Appendix C

Thus, the analysis leading to a correct disposition of this litigation has two components: the defendant's actual wartime activities, and whether the defendant was guilty of willful misrepresentation by concealment of material facts. For a variety of reasons, neither line of inquiry has been easy.

Determination of exactly what did or did not occur during the relevant 1941-1944 period is rendered particularly difficult in this case, not only because the pertinent events occurred nearly 40 years ago, but because, unlike virtually every other reported denaturalization case, there is in this case not one scrap of documentary evidence relating to the pertinent events. The factfinder is relegated entirely to the testimony of witnesses, uncorroborated by any documentary evidence, and unrefreshed by any contemporaneous or relatively early recordation of their recollections of the pertinent events. For example, none of the Government's witnesses against the defendant is on record with any charges against the defendant until 1975 or 1976. None of the important witnesses for either side is fluent in the English language. Many testified through interpreters, and all would have benefitted from such assistance. And many testified by way of videotape deposition. It is extremely difficult to rach a confident conclusion, on the basis of witness demeanor, concerning the accuracy and reliability of testimony presented on videotape through an interpreter. Moreover, none of the witnesses can be deemed truly impartial, for reasons which will be elaborated below.

It is obvious, of course, that if the Government's witnesses were correct, the defendant and his witnesses were lying; and if the defendant is correct, the government witnesses were either lying or simply mistaken, in identifying this defendant as a participant in atrocities. With relatively minor exceptions, there was nothing in the demeanor of any of the witnesses that would

cause me to believe, with any degree of confidence, that any of the witnesses for either side was consciously lying. In the absence of persuasive clues derivable from witness demeanor, it is necessary to look to other factors which tend to corroborate or impeach the various accounts.

FACTORS TENDING TO CAST DOUBT UPON THE DEFENDANT'S VERSION

The defendant was approximately 19 years of age when the Germans occupied Lubomyl. His father had been at odds with, and dealt with harshly by, the Russian government earlier in his life, and it would be natural to suppose that the entire Kowalczuk family, all ardent anti-Communists, would be inclined to support the German cause. The defendant was able-bodied, in good health, and of suitable age for military service. It is unlikely that he would have been permitted to escape some form of military service or forced labor, except by performing local police duties approved by the Nazis, and under their direction. Assignment to the warehouse to supervise food distribution under the rationing plan would not be inconsistent with membership in, and even a high-ranking position in, the Lubomyl schutzmannschaft. If the Lubomyl schutzmannschaft generally were as active in repressive activities as the Government's evidence suggests, it would be most unlikely that the defendant would not have known about it. Yet the defendant, by his own testimony, worked daily at the police station, typing and distributing duty rosters, typing and filing police reports, etc. It is inconceivable that these reports would not have dealt with instances of repression of the Jewish population.

By defendant's own account, he had been performing clerical duties at the police station for about a year when, in August 1942,

he was sent away for additional training in local administration. The Government suggests that this testimony is a complete fabrication, designed to provide defendant with an alibi for the events leading up to and culminating in the October 1, 1942 liquidation of the Lubomyl ghetto. The evidence as a whole leads me to believe that the defendant probably was absent from Lubomyl attending training classes during the period in question. But it is significant that, as the defendant himself concedes, this additional schooling included classes in the German language, and that the additional training was arranged by the "town government" set up by the occupying Germans. It is impossible to avoid the inference that the defendant had found favor with the Nazi occupiers of Lubomyl, and was being trained for even greater service in the future.

If the defendant's activities had been as innocuous as he claims, there would have been little reason for him to leave Lubomyl with the retreating Germans. It must be admitted, however, that this argument is considerably weakened by the fact that the defendant's parents, at least, had valid reasons for leaving at that time, and it would be quite understandable that the family would wish to remain together. Moreover, flight from the advancing Russian army was a widely prevalent mode of behavior.

When the defendant filled out his CM/1 form, he omitted all mention of his residence and employment in Lubomyl. According to that form, plaintiff spent the entire 1939-1944 period working as a tailor in the town where he was born and grew up, Kremainec (stated to be in Poland, but actually in that part of the Ukraine which had been occupied and governed by Poland from 1920 until World War II).

The Soviet witnesses, and some of the non-Soviet witnesses,

who testified for the Government were personally acquainted with the Kowalczuk family, and therefore unlikely to have made an honest mistake in identification. And, it can be argued, it is unlikely that there could be so many instances of mistaken identification.

FACTORS TENDING TO CAST DOUBT UPON THE GOVERNMENT'S EVIDENCE OF DEFENDANT'S PARTICIPATION IN ATROCITIES

Although the Nazi regime was characterized by meticulous record-keeping, not one scrap of documentary evidence has ever surfaced which reflects or even refers to the happenings at Lubomyl, the existence of a Lubomyl schutzmannschaft, the extent to which indigenous forces were used by the Germans in that area, etc. Both the Soviet Union and the western allies compiled extensive lists of persons suspected of war crimes; the defendant's name has never appeared on any such list. The Ukrainian militia was never listed as a suspect organization.

After the Russians occupied the Ukraine, they arrested and prosecuted various members of the Ukrainian militia, including persons who had been stationed at Lubomyl. It is reasonably clear that the defendant's name was never mentioned in any of those trials as a participant in atrocities.

All of the non-Soviet witnesses for the Government claim to have had many discussions among themselves, over the years, reminiscing about the events at Lubomyl, and some of them have previously aided in the prosecution of persons suspected of anti-Jewish activities, including testimony at some of the war crimes trials. Yet no complaint against the defendant was ever registered, nor, so far as the record discloses, was his name even mentioned

by any of these witnesses, until 1975.

The defendant never made any attempt to conceal his identity. Neither did his brother, Mikola. Both men spent four years in the displaced persons camp at Lexenfeld, Germany. Although defendant's CM/1 form did not disclose that he had lived and worked in Lubomyl, his brother's did. The camp population included at least 800 Ukrainians, many from the same area in which Lubomyl is located. Throughout this period, there was fierce competition for the few available visas. It seems highly unlikely that, if the defendant or his brother had been guilty of disqualifying repressive activities, the defendant's guilty secret would not have been put to advantageous use by other visa-seekers.

Immediately upon his arrival in this country in 1949, defendant obtained employment as a tailor. He has held the same job ever since. His employer is Jewish and testified, most impressively, in favor of the defendant at the trial. It is clear that neither his employer nor any of the many other witnesses who have been intimately associated with the defendant in the post-war years ever detected any trace of anti-Semitism in the defendant, or any character traits consistent with the type of person who might have been involved in atrocities.

The Government's case is significantly weakened by the undisputed evidence concerning the genesis of the present charges against the defendant, and the genesis and history of similar charges against his brother Mikola. Because of their importance, the circumstances will now be reviewed in some detail.

Throughout their stay at the DP camp, and for several years after their arrival in this country, the defendant and his brother had been unable to ascertain the fate of other members of the

Kowalczuk family, or the whereabouts of any surviving relatives. It was not until 1958 that they were able to locate other members of the family, who had returned to the Ukraine and were residing there. Beginning in 1958, the defendant and his brother corresponded with their surviving relatives in the Ukraine, and periodically sent packages of food and consumer goods. That practice was frowned upon by the Soviet authorities, not only because it was viewed as an unwelcome reminder of the disparities between the living conditions in the United States and in the Soviet-controlled Ukraine, but also because most Ukrainian emigres were supporters of Ukrainian independence. It soon became apparent that the recipients of defendant's letters and packages were likely to be harmed, rather than helped, thereby; and the Kowalczuk brothers decided to discontinue the correspondence until Soviet-American relations improved. But as a result of the correspondence, Soviet officials learned of the defendant's existence and whereabouts.

The first accusations against the defendant and his brother appeared on December 8, 1963, in a Soviet publication called "Trud". "Trud" is the (unofficial) organ of the KGB. It was then, and continues to be, the policy of the Soviet government to castigate, and undermine the acceptability of, the Ukrainian independence movement. Moreover, during much of the "Cold War" era, depicting the United States as a haven for war criminals would coincide with Soviet interests. And there is ample support in the record for the proposition that false or exaggerated accusations have often been employed by the Soviet government as a political weapon.

Shortly after the charges were published in Trud, they were picked up by the wire services and [illegible]cized in this country. Both the defendant and his brother indignantly denied the charges. At

that time, Mikola's application for citizenship was pending. The charges were thoroughly discussed with Mikola Kowalczuk by INS officials. On the basis of their investigation, the INS did not recommend that the application be rejected. Instead, the court was advised of the charges and Mikola Kowalczuk's denials, and was further advised that INS had been unable to substantiate the charges. Mikola's application for citizenship was granted. Nevertheless, in 1977, contemporaneously with the filing of the present action against Serhij Kowalczuk, the Government filed a similar petition seeking to revoke the citizenship of Mikola Kowalczuk, on the ground that he had falsely concealed his membership in the Ukrainian militia, and his participation in the Lubomyl atrocities. It was not until shortly before the trial of the present case that the Government withdrew its complaint against Mikola Kowalczuk, conceding that the evidence against him was insufficient.

It is reasonably clear that, on the basis of interviews with the Israeli witnesses, the Government was prepared to proceed against both brothers. Indeed, some of the Israeli witnesses in this case identified Mikola as a member of the Ukrainian militia active in assisting the Nazi opporessors. The decision to drop the case against Mikola was made after it became apparent that the testimony of the Soviet witnesses who had actually served in the Lubomyl contingent of the Ukrainian militia would not support the charges against Mikola. It is worthy of note that, at the time of the pertinent events, Mikola Kowalczuk would have been about 15 years of age.

Thus, while it can be argued that the failure of the Soviet witnesses to implicate Mikola enhances the credibility of their testimony against the defendant, there remain seriou· ɹ.estions about the reliability of the testimony of the Israeli witnesses.

Appendix C

Witnesses who stand ready to identify as a leader of the Ukrainian militia someone who turns out to have been only 15 at the time, and, apparently, not involved in such activities, may very well be mistaken in their recollection of other pertinent details.

Turning now to an analysis of the testimony of the non-Soviet witnesses, several problems bear mention. As noted above, the record as a whole proves beyond doubt that the specific atrocities referred to by the various witnesses did in fact occur. But whether the account of a particular witness is based upon complete and accurate first-hand observations, or upon the common knowledge of the community, or partial observations reinforced by hearsay, cannot readily be determined. Neither is it possible to determine with certainty the extent to which the witnesses' identification of the defendant as a participant may be the product of more recent reinforcement. A witness who is aware that the commandant or deputy commandant of the Lubomyl schutzmannschaft worked hand-in-glove with the Nazis in persecuting Jews, and who learns years later that the defendant has been charged with having served as the commandant or deputy commandant, might readily achieve a firm present recollection that indeed it was the defendant who participated in particular incidents.

There were three non-Soviet witnesses to the events at Lubomyl who testified at the trial. Moshe Lipshultz and Shimeon Koret testified by videotape deposition, Mr. Getman testified in person. I am confident that all three gentlemen testified honestly, and the comments which follow are not in any way intended as criticism; but it is important to recognize the necessity of avoiding the perhaps natural tendency to translate one's feelings of outrage at the atrocities undoubtedly committed by the Nazi occupiers of Lubomyl, and sympathy for the victim-witnesses, into uncritical acceptance of all of the details of their testimony. The plain fact

is that there are substantial reasons for questioning the reliability of this evidence, insofar as it purports to involve the defendant in specific acts of atrocity.

The witnesses all identified (with some variations in definiteness) photographs of the defendant as being the person observed committing atrocities. There is no possibility of evaluating the fairness or reliability of the identification process. The record does disclose that the identification procedures were conducted by officials of the Israeli government, and that each of the witnesses knew in advance that the investigation concerned the activities of "Nazi war criminal Serhij Kowalczuk."

Mr. Getman, the only witness who testified at trial in person, was not asked to, and did not, identify the defendant in the courtroom. Moreover, Mr. Getman was only 15 years of age when the pertinent events occurred, and resided in a rural area outside of Lubomyl during most of the period.

Mr. Lipshultz provided the most extensively damaging testimony against the defendant, but there is room for the suggestion that his demonstrated willingness to ascribe to the defendant personal responsibility for virtually every one of the long list of atrocities catalogued by the witness (irrespective of whether the witness was really in a position to observe, and irrespective of whether the guilty party merely bore some general resemblance to the defendant) demonstrates a tendency toward exaggeration and embelishment. It is obvious that, because of Mr. Lipshultz's prolonged efforts on behalf of a committee to establish a memorial to the Lubomyl victims, he has had many discussions with Lubomyl survivors and has become very familiar with all of their accounts of events. While his testimony may properly be relied upon as establishing that the events occurred,

his identification of the defendant as a participant is plainly much less reliable. It is noteworthy, also, that his detailed and firm descriptions of the uniforms worn by the defendant, and the uniforms and weaponry of the schutzmannschaft members generally, seem totally at odds with all of the other evidence in the case.

The testimony of Shimeon Koret, a retired official of the Israeli foreign ministry, was also very damaging to the defendant. But Mr. Koret had earlier given a sworn statement to Israeli officials which differs in important details from the testimony presented at trial. Moreover, his insistence that Mykola Kowalczuk, as well as Serhij, was an active participant in the schutzmannschaft and in the atrocities in August 1941 (when Mykola was a 15-year-old student), while it could perhaps be accurate, is enough to give one pause.

The testimony of the Soviet witnesses must be viewed with even greater skepticism. While I do not believe this testimony can be simply dismissed as fabrication instigated by a hostile government and while there was nothing in the demeanor of the witnesses (so far as this can be assessed by videotape through an interpreter), or in the conduct of the depositions, to suggest that this evidence is unworthy of belief, the fact remains that these witnesses were all selected and made available by the Soviet government and were under its control; they could scarcely be expected to testify except in support of the charges originally aired by the Soviet government for its own reasons.

Finally, considerations of basic fairness to the defendant militate against accepting the testimony of the government witnesses as "clear and convincing" proof of charges as serious as those leveled against this defendant. Neither the Government

nor the defendant was permitted to interview other persons in Soviet-controlled territory having knowledge of the facts, or even to visit Lubomyl, where a great many persons familiar with the events still reside. The notion that only selected witnesses favorable to the government have been permitted to testify (and with the opportunity for informed and meaningful cross-examination severely restricted) is not easily squared with accepted concepts of due process of law. There is also the problem of the delay in instituting the present proceedings. While there is no applicable statute of limitations, and the present proceeding is not subject to the defense of *laches*, we must not lose sight of the fact that the defendant and his witnesses have identified on this record a substantial number of persons (including, for example, a parish priest and a dentist) who were intimately familiar with the occurrences at Lubomyl and with the defendant, whose testimony might well have been favorable to the defendant, who have died in recent years.

For the most part, therefore, the factual conclusions which follow are based upon the testimony of the defendant and his witnesses, or other evidence not inconsistent with that testimony.

FACTUAL CONCLUSIONS CONCERNING DEFENDANT'S WARTIME ACTIVITIES

The rules by which the civilian population of Lubomyl was governed during the German occupation were established entirely by the German authorities. Neither the defendant nor any other non-German bears any responsibility for the formulation of the repressive policies directed against Jews, but the occupying authorities did rely upon "indigenous forces", *i.e.*, segments of the local population, to carry on the functions of government and to enforce observance of the restrictive edicts.

Appendix C

Shortly after the Germans occupied Lubomyl in 1939, a schutzmannschaft was established in Lubomyl. During the relevant period, there were four significant components of the Lybomyl population: (1) the German occupiers. These included a relatively small group of permanently assigned police, the "gendarmerie" and, intermittently, military units and representatives of the S.S. and Gestapo; (2) the local Ukrainian government establishment, including the mayor and civilian employees of the government, and the schutzmannschaft, or local police force/miltia; (3) the Jewish population, restricted to the ghetto, with its own *ad hoc* government, the "judenrat"; and (4) the remaining civilian population.

All able-bodied persons were expected to work. While it is not possible to derive from the evidence in this case a complete and detailed portrayal of life in Lubomyl during the war, it appears that the ruling principle was that persons who performed labor were able to obtain the necessities of life for themselves and their families, and that the arrangements by which this was accomplished depended upon the nature of the work performed and the place of employment. The German authorities operated their own food-distribution system for their personnel, and also determined (apparently) the arrangements by which food and other supplies were allocated to the various segments of the local population. At any rate, it is clear that the local Ukrainian authorities were responsible for the distribution of food to persons employed by the local government, including the schutzmannschaft. The defendant was responsible for the distribution of food and other supplies to persons entitled to receive the same by virtue of their employment as part of the local government (and, it appears, also to some extent with the distribution of allotments of supplies to the local governments of other nearby communities).

Appendix C

Defendant's work at the food-distribution warehouse was not a full-time job. It depended upon the amount of food and other supplies available, and generally occupied less than half of the work day.

The evidence as a whole makes it quite clear that the defendant did occupy a position of some responsibility with the schutzmannschaft. He had his own office there (one of only three such private offices); he typed up and issued duty rosters; he typed the daily reports of police activity, etc. He probably wore a police uniform of some kind, during at least some of his duty hours at the police station.

Neither the German gendarmerie nor the schutzmannschaft or other members of the local Ukrainian government was aware of the fate which was planned for the Jewish population. They knew that Jews were being rounded up, and that they were to be confined in the ghetto. They knew that Jews were to be punished if they failed to wear the appropriate insignia, if they left the ghetto, or if they otherwise violated the restrictions placed upon them. The ultimate liquidation of the Jewish population of Lubomyl in September-October 1942 was planned and carried out by a roving contingent of the einsatzgruppen. It is doubtful that even the local German gendarmerie had advance warning of the project.

The Germans who carried out the liquidation utilized significant numbers of Ukrainian militiamen to assist them in escorting the Jews from the ghetto to the execution site, and to prevent escapes. It is very clear that most of these Ukrainian militia were imported specifically for the task, from locations other than Lubomyl. Although the record leaves open the distinct possibility that members of the Lubomyl schutzmannschaft were also

involved, I am inclined to doubt that the defendant participated in any way. It suffices to register my firm conclusion that the evidence is plainly insufficient to constitute clear and convincing proof of defendant's involvement in the massacre.

What the evidence does establish with the requisite clarity and conviction is that the Lubomyl schutzmannschaft regularly and routinely enforced the martial law restrictions imposed by the Germans, including beating Jews found outside the ghetto after curfew, beating or severely reprimanding Jews who failed to wear the required insignia, assisting the Germans in confiscating valuables from the Jewish inhabitants, arresting and participating in the harsh punishment of persons involved in black-market activities or subversive activities hostile to the German occupation forces; and that the defendant was aware of the responsibilities assigned to the schutzmannschaft, and occupied a responsible position, albeit largely clerical, within that organization.

The record reveals few if any instances in which the Ukrainian militiamen performed serious acts of oppression outside the immediate presence of the Germans who exercised ultimate control. It is apparent, however, that members of the schutzmannschaft accompanied the German gendarmes on the many occasions disclosed by the testimony when persons were rounded up for forced labor, or arrested for various supposed infractions; that many of the persons thus apprehended were killed soon afterward; and that members of the schutzmannschaft were present during such executions. Although the evidence does not disclose, with the requisite clarity and conviction, that the defendant personally participated in any of these individual atrocities, the evidence as a whole leaves little doubt that everyone associated with the schutzmannschaft, including the defendant, must have known of the harsh repressive measures which the schutzmannschaft were

carrying out pursuant to German direction.

FACTUAL CONCLUSIONS CONCERNING MISREPRESENTATION AND CONCEALMENT IN THE PROCESSES LEADING TO NATURALIZATION

In his CM/1 personal-history form, the defendant intentionally misrepresented and/or concealed his residence in Lubomyl and his employment by the town government there during the German occupation. When this form was filled out, it is probable that defendant's principal motivation was to avoid the risk of repatriation to Soviet-controlled territory; and it is entirely possible that he informed the interviewer of the true situation, as he testified. It is unnecessary to resolve this issue, however, since the statements in the CM/1 form were not made to an official administering the DPA, nor were they made for the purpose of gaining admission to the United States.

In applying for a visa and submitting the fragebogen, however, the defendant plainly was making representations for the purpose of gaining entry to the United States. It is probably true that the background information in the fragebogen was largely the result of merely copying the information set forth in the CM/1 form, but the defendant cannot avoid responsibility for the inaccuracies and omissions in that submission.

It is not at all clear that, in 1949, membership in or employment by the schutzmannschaft at Lubomyl would have precluded the issuance of a visa. Until the 1950 amendment to the DPA, IRO certification of eligibility was being accepted as virtually conclusive. It is significant that the Government is able to cite several instances of rejection of applicants for their association with the Ukrainian militia, but all of these instances

occurred after the 1950 amendment of the statute. On the other hand, the testimony of Mr. Thomas makes it clear that, even in 1949, disclosure of membership in the Ukrainian militia would at least have prompted further inquiry. And it seems quite probable that consular officials would not knowingly have issued a visa to a person who actively assisted the Nazis in persecuting civilians, regardless of the extent of his direct personal involvement in atrocities.

LEGAL ISSUES

The statute requires revocation of citizenship if it was either illegally procured, or procured by willful concealment or misrepresentation of material facts. 8 U.S.C. § 1451(a). In *Chaunt v. U.S.*, 364 U.S. 350 (1960), it was established that, in this context, "material facts" are those facts which, if disclosed, "(1) . . . would have warranted denial of citizenship or (2) . . . might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at p. 355.

In my view, the record does not justify a conclusion that, in his application for citizenship, the defendant knowingly provided false information. And, unless he had personally committed serious atrocities (a fact not proven, as discussed above), it is doubtful that his failures to disclose amounted, at that point, to "willful concealment".

In *Fedorenko v. U.S., supra*, the Supreme Court left open the question of the applicability of the *Chaunt* tests to antecedent visa applications. The Court found it unnecessary to address that issue because of its conclusion that Fedorenko's visa had been illegally procured, thus rendering his entry to the United States illegal, and the grant of citizenship similarly flawed as a result.

Appendix C

While *Fedorenko* was a much clearer case than is Kowalczuk's (service as a concentration camp guard is more obviously persecution than is service in a local police force), that decision controls disposition of the present case. The same ultimate conclusion inevitably follows.

ULTIMATE CONCLUSIONS

1. The defendant Serhij Kowalczuk was not a genuine refugee "of concern" to the IRO, and therefore was not entitled to the benefits of the Displaced Persons Act, because:

a. He assisted the Nazis in persecuting civilian populations, through his role as a member of the Lubomyl schutzmannschaft.

b. The Lubomyl schutzmannschaft, of which the defendant was voluntarily a member, voluntarily assisted the enemy forces in their operations against the United Nations.

2. Defendant Serhij Kowalczuk illegally obtained his visa, because he made a willful misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person, within the meaning of § 10 of the DPA.

3. Because his entry into the United States for permanent residence was illegal, the defendant Serhij Kowalczuk illegally obtained his naturalization certificate.

4. The petition of the Government must be granted.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 77-118

UNITED STATES OF AMERICA,

Plaintiff

v.

SERGE KOWALCHUK, a/k/a SERHIJ KOWALCZUK,

Defendant

ORDER

AND NOW, this 1st day of July, 1983, it is ORDERED:

1. The Government's Amended Petition for revocation of citizenship of the defendant Serhij Kowalczuk is GRANTED.

2. The Order of this Court, entered November 30, 1960, admitting Serhij (Serge) Kowalczuk, to United States citizenship, is REVOKED AND SET ASIDE.

3. Certificate of Naturalization No. 8250996 issued to the defendant is CANCELLED.

4. The defendant is ordered forthwith to surrender said Certificate of Naturalization to the United States Attorney of this District.

s/ John P. Fullam

J.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING JUDGMENT, FILED SEPTEMBER, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1571

UNITED STATES OF AMERICA

vs.

SERGE KOWALCHUK, a/k/a SERHIJ KOWALCZUK

Serge Kowalchuk, Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, MANSMANN, and ROSENN, *Circuit Judges*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel April 23, 1984 and reargued before the Court *in banc* May 6, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 5, 1983, be, and the same is hereby affirmed. Costs taxed against the appellant.

Appendix D

ATTEST:

s/ Sally Irvos
Clerk

September 23, 1985

Costs taxed in favor of appellee as follows:

Appendix.....	$135.00
Brief.....	207.15
TOTAL	$294.90

Certified as a true copy and issued in lieu of a formal mandate on October 15, 1985.

Test: s/M. Elizabeth Ferguson
Chief Deputy Clerk, U.S. Court of Appeals
for the Third Circuit

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT STAYING MANDATE TO NOVEMBER 22, 1985 FILED OCTOBER, 1985

October 21, 1985

UNITED STATES OF AMERICA

vs.

KOWALCHUK, SERGE, Appellant

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, MANSMANN and ROSENN, *Circuit Judges*

1. Appellant's Motion for stay of mandate pending application for certiorari, which the Court may wish to treat as a motion for recall and stay of the mandate to and including November 22, 1985.

2. For your information, the Opinion and Judgment on Rehearing in banc were filed on September 23, 1985. The certified judgment in lieu of formal mandate issued on October 15, 1985.

in the above-entitled case. Any answer which would be due by October 31, 1985, will be forwarded to you upon receipt of same.

Respectfully,

s/ Michelle Leverette
Deputy Clerk
Direct Dial 597-3134

ml
enc.

Appendix E

The foregoing Motion is granted

By the Court,

s/ Aldisert

Chief Judge

Dated: October 29, 1985